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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6152

JANICE HAYES, Appellant

v.

VALLEY BANK OF NEVADA, SCOTTY GLADSTONE, MERVIN IVERSON

Appellees

ON APPEAL FROM THE SUPREME COURT OF NEVADA

JURISDICTIONAL STATEMENT

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Appellant in Proper Person

February 26, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

JANICE HAYES, Appellant

v.

VALLEY BANK OF NEVADA, SCOTTY GLADSTONE, MERVIN IVERSON, THE JUSTICES OF THE SUPREME COURT OF NEVADA, and THE STATE OF NEVADA,

Appellees

ON APPEAL FROM THE SUPREME COURT OF NEVADA

JURISDICTIONAL STATEMENT

JANICE HAYES, the appellant in proper person, submits herewith her jurisdictional statement. She appeals from final Orders of the Supreme Court of Nevada, each dated December 3, 1979, dismissing appeals in two cases, Janice Hayes v. Valley Bank, 11631, and Janice Hayes v. Scotty Gladstone and Mervin Iverson, No. 11992.

The Justices of the Supreme Court of Nevada and the State of Nevada were not parties to the action in the court below, but are added here as parties in interest.

The Appellant respectfully asks that the above appeals be consolidated with an appeal which has already been docketed in this Court on December 12, 1979, as Case No. 79-5777, Janice Hayes v. Board of Trustees of the Clark County School District.

Case No. 79-5777 is also an appeal from an Order of the Supreme Court of Nevada, entered September 12, 1979, dismissing an appeal to that Court, pursuant to Nevada Rule of Appellate Procedure 46(b), which prohibits appearances in proper person before the Nevada Supreme Court.

The subject of all three appeals to this Court is the same: whether the Nevada Supreme Court may constitutionally dismiss appeals for the sole reason that Appellant was not represented by an attorney.

OPINIONS BELOW

None of the opinions has been officially reported. The Court did not address the issue of the constitutionality of Rule 46(b) in any of its Orders.

In case No. 11631, Hayes v. Valley Bank, the Order dismissing the appeal was entered on October 4, 1979, p.2a infra, and the Order denying rehearing on December 3, 1979. See p. 3a, infra.

In Case No. 11992, Hayes v. Gladstone, an Order was entered dismissing the appeal on August 16, 1979, p. 7a, infra and the Order Denying Rehearing on December 3, 1979, p. 3a.

The Orders dismissing the appeal and denying rehearing in Janice Hayes v. Board of Trustees, Case No. 79-5777 in this Court, are appended to that Jurisdictional Statement as p. 4a and p. 5a therein.

JURISDICTION

In Case No. 11631, Hayes v. Valley Bank, the Nevada Supreme Court dismissed the appeal on October 4, 1979, p. 2a infra, and the Order denying rehearing was entered on December 3, 1979. See p. 3a, infra. The Notice of Appeal to this Court was filed in the Supreme Court of Nevada on December 11, 1979. See p. 4a, infra.

In Case No. 11992, Hayes v. Gladstone, the Order

Dismissing Appeal was filed on August 16, 1979, p. 7a, infra, and the Order Denying Rehearing on December 3, 1979. See p. 8a.

Appellant has taken a precautionary appeal to this Court in Hayes v. Gladstone. The Notice of Appeal was filed in the Supreme Court of Nevada, on December 11, 1979. See p. 9a, infra.

The trial court denied Appellant's motion for an injunction, (see p. 5a, infra) but failed to enter a written appealable Order specifically stating this. To avoid the possibility of a decision such as those rendered in Charmicor, Inc. v. Bradshaw, et al, 92 Nev. 310, 550 P. 2d 413 (1976) and Manzonie v. State ex rel De Ricco, 81 Nev. 53, 398 P. 2d 694 (1965) 81 Nev. 53, 398 P. 2d 694, Appellant was compelled to appeal from the Order as entered and from the dismissal of three counts, notwithstanding that she knew these were not ordinarily appealable Orders, and she appeals to this Court for the same reason.

The appeals in Cases No. 11631 and 11992 are being docketed in this Honorable Court within 90 days from denial of rehearing in each case in the Nevada Supreme Court on December 3, 1979. (There was insufficient time to incorporate these appeals in the Jurisdictional Statement in Case No. 79-5777, as Appellant would have preferred to do, as that statement was due on December 11, 1979 and Appellant just received notice on December 8 that Mr. Justice Rehnquist had denied her application for an extension of time.)

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2) for review of the constitutionality of a state statute and a Rule of Court.

Nevada Rule of Appellate Procedure 46(b) provides:

> "No party, except a habeas corpus petitioner, may appear in proper person before the Supreme Court."

Nevada Revised Statutes, Volume 2, page 1004.

A Rule of the Nevada Supreme Court restates this provision, but does not by itself affirmatively prohibit pro se appearances.

Nevada Supreme Court Rule 44 provides that:

> "Nothing in these rules shall be so construed as to prevent any person from appearing in his own behalf in any court in this state except the supreme court.

Nevada Revised Statues, Volume 1, page 242.

In this Jurisdictional Statement, appellant will refer

only to Nevada Rule of Appellate Procedure 46(b), NRAP 46(b).

QUESTIONS PRESENTED

Whether Nevada Rule of Appellate Procedure 46(b) is violative of the right to petition for the redress of grievances, the fundamental right of access to the courts, the right of self-representation, due process and equal protection of the laws as guaranteed by the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, when this Rule is applied to deny the appellant the right to litigate fully in the trial courts of Nevada and to cause dismissals of her appeals, solely because of her lack of funds to pay an attorney.

Another question presented was not expressly raised by Appellant in the lower court but it is fairly comprised in the question of the constitutionality of NRAP 46(b). This subsidiary question is:

Whether the requirement that appellants in Nevada must employ an attorney represents a system of price-fixing, restraint of trade and monopoly by the legal profession.

RAISING THE FEDERAL QUESTION

The issues of the constitutionality of NRAP 46(b) did not arise in the trial court in any of the cases presented. The Nevada Supreme Court is the only appellate court in Nevada to which appeals are taken from the trial courts, designated as District Courts. In both Case No. 11631 and 11992, the Record on Appeal was transmitted to the Supreme Court and docketed there without cost to the appellant. The question arose when the Nevada Supreme Court would not grant appellant leave to proceed in proper person and to file briefs in that Court.

The Nevada Supreme Court has not expressly upheld the validity of NRAP 46(b) but has impliedly done so by denying motions to appear in proper person, by refusing to rule on

motion for a declaratory judgment that Rule 46(b) is unconstitutional and by dismissing appeals because of appellant's inability to comply with this Rule. The Court has consistently evaded the issue and sought to contrive other reasons for dismissing appeals.

In Hayes v. Valley Bank, the appellant raised the federal question in a motion for leave to appear in proper person in motions for a declaratory judgment and in a petition for a rehearing of the Order dismissing the appeal.

In Hayes v. Gladstone, the appellant raised the issue in a motion for leave to appear in proper person, in motions for rehearing on orders dismissing the appeal and denying leave and in a motion for a declaratory judgment.

As set forth on page four of the Jurisdiction Statement, in Case No. 79-5777, the appellant raised the federal question in a motion for leave to appear in pro per, in a petition for reconsideration of the denial of that motion, in a pleading responding to Respondent's opposition to her motion, in motions consenting to a voluntary dismissal without prejudice and in the petition for rehearing of the Order dismissing the appeal.

Taking all three cases together, the Appellant has raised the federal question in fourteen motions and petitions filed with the Nevada Supreme Court.

Appellant filed a complaint in the federal district court, Case No. CV-LV-79-142 RDF. That court dismissed the complaint on February 7, 1980, without hearing, but Appellant has received only a copy of the minute Order, which does not state a reason for the dismissal.

STATEMENT OF THE CASE

Case No. 11631, Hayes v. Valley Bank

The appellant, Janice Hayes, was the holder of a Master Charge card issued by the appellee, Valley Bank.

In November, 1975, Valley Bank caused a Western Union messenger to be sent to appellant's home at 10 p.m., demanding return of her Master Charge card. There were then no payments due and owing. Valley Bank charged appellant $18.60 for the telegram and failed to return this amount to her.

Valley Bank continued a pattern of harassment, with letters constantly threatening legal action. Although payments were timely made, Valley Bank charged "late fees" and distributed reports that appellant's account was delinquent.

In March, 1977, Valley Bank filed suit asking for payment of the total account, attorney's fees and costs of suit. (Nevada law allows recovery for attorney's fees). Appellant, in proper person, filed an Answer in which she listed her claims against Valley Bank in what she intended to be a counterclaim. She did not, however, include the specific word, "counterclaim."

At that time, the appellant was a layperson with no legal training. She could not afford an attorney. She had not received any salary since August, 1976 on the employment contract she had with the Clark County School District.

After receiving Appellant's answer, Valley Bank took no further action and did not even send out monthly billings.

In June, 1977, appellant took out the money she had on deposit in the state retirement fund for teachers, in which she had vested rights, in order to pay creditors, Valley Bank among them, before she left Las Vegas to start law school in Los Angeles. (Nevada has no law school.)

The Appellant sent Valley Bank a certified check by certified mail for the entire balance due, but not including the sums asked for attorney's fees and costs.

After receiving this check, Valley Bank sent Appellant a proposed "Hold Harmless" agreement, wherein both parties would agree to forego any further legal action. Appellant refused to sign this agreement.

Valley Bank had also failed to pay the appellant $40.32 for an error in her favor disclosed in an audit conducted in 1975 at appellant's request.

No further pleadings were filed for more than a year, until June 8, 1978, when Valley Bank obtained an Order, without appellant's knowledge, dismissing the action. The Order erroneously stated that the matter was dismissed with prejudice as to the defendant, Janice Hayes. (Emphasis added.) P. 12a, 13a.

The district judge denied appellant's motions to amend or vacate the Order, for leave to supplement the counterclaim and for a separate trial of the counterclaim. The appellant appealed in proper person to the Nevada Supreme Court.

The Clerk transmitted the record without cost to the appellant or payment of bond, even though the judge had not signed appellant's motion to proceed in forma pauperis.

By letter dated February 16, 1979, the Clerk of the Nevada Supreme Court notified appellant that the record had been received. Appellant paid the fee and the appeal was docketed. This letter, appended hereto as p. 1a, advised appellant about NRAP 46(b). The last paragraph states:

"I wish to bring to your attention Rule 46 of the Nevada Rules of Appellate Procedure pertaining to practice before this court."

The Appellant filed motions for leave to proceed in proper person and to waive compliance with NRAP 30 and NRAP 32 in the Nevada Supreme Court on March 6, 1979.

The Clerk did not set a date for oral argument, as is customarily done when an appeal is docketed, not when the last brief is filed. All appeals are set for oral argument.

The fact that appellant's appeal was not scheduled for argument demonstrates that the Court had no intention of allowing her to file briefs and would not have done so, even if she had filed for an extension of time.

As there is generally a two-year wait between docketing

and oral argument, any delay in filing briefs could not have prejudiced the appellee or inconvenienced the court.

By letter dated May 15, 1979, the Clerk notified Appellant that he had received the Order from the district court granting leave to proceed on appeal in forma pauperis. This Order had no effect at this point, as the record had already been docketed without cost and pursuant to NRAP 32(a), the appellant could submit briefs duplicated on standard 8½ by 11 paper, rather than printed briefs,even if she were not proceeding in forma pauperis.

On October 4, 1979, apparently on its own motion, the court dismissed the appeal for the specious reason that Appellant had not filed briefs by June 25, which date is arbitrary as it has no relationship to the date on which the notice of appeal was filed or when the appeal was docketed, pursuant to NRAP 31(a). The appellee had been notified of appellant's reason for not filing briefs.

On December 3, 1979 the court denied the petition for rehearing and the appeal to this court followed.

Prior to this, realizing that the Nevada Supreme Court might dismiss her appeal and to avoid a statute of limitations bar of her claims, Appellant filed an action in federal court against Valley Bank, MasterCharge and other defendants, Case No. CV-LV-79-182 HEC, but she has not served the defendants yet.

* * * * *

Case No. 11992, Hayes v. Gladstone and Iverson.

This case arose from the same set of occurrences as Case No. 79-5777, Janice Hayes v. Board of Trustees of the Clark County School District, and the facts are set forth in the Jurisdictional Statement and Brief in Opposition to Motion to Dismiss Appeal filed in No. 79-5777.

The Appellant, Janice Hayes, had been employed as a teacher by the Clark County School District ("District") for thirteen years, since 1963. In March of each year, Appellant was

offered and accepted reemployment for the next year. Contracts are signed in March, pursuant to N.R.S. 391.3196(1), but do not commence until August, the beginning of the next school term.

The employment of teachers is governed by statutes, which are strictly construed. School boards have only the powers granted to them by statute.

Three relevant statutes are N.R.S. 391.3196(1) and (2), 391.120 and 391.170.

Nevada Revised Statute 391.3196 provides that:

> (1). On or before April 1 of each year, the board of trustees shall notify certificated employees in writing concerning their reemployment for the ensuing year. If the board . . . fails to notify a certificated employee . . of his status for the ensuing year, the employee shall be deemed to be reemployed for the ensuing year.
>
> (2) This section does not apply to any employee who has been recommended to be demoted, dismissed or not reemployed if such proceedings have commenced and no final decision has been made by the board.

The proceedings referred to commence when the superintendent notifies the teacher by certified mail of his intent to recommend dismissal, pursuant to NRS 391.317. If this is done prior to April 1, the teacher has already received the notice required in NRS 391.3196(1).

If the board has not already done so, it must issue formal contracts to teachers who have been reemployed prior to the start of the school year. NRS 391.170 provides that:

> A teacher is not entitled to receive any portion of the public school moneys as compensation for services rendered unless:
>
> 1. The teacher is legally employed by the board of trustees of the school district . .

N.R.S. 391.120 provides that:

> 1. . . conditions shall be embodied in a written contract, or notice of reemployment, to be approved by the board and accepted and signed by the teacher. A copy of the contract or notice of reemployment, properly written, shall be delivered to each teacher not later than the opening of the term of school.

(Emphasis added.)

It is well settled law that teachers who are not legally employed may not recover even in quantum meruit for their services and school boards may not pay such persons, who, by a legal fiction, are considered to have volunteered their services. This principle is emobodied in N.R.S. 391.170.

The school board did not issue any contracts, other than the notices of reemployment, prior to or at any time during the 1976-77 school year. These notices must be deemed to be contracts in conformance with NRS 391.120. The school board could not have paid teachers, as it did, unless the Notices of Reemployment issued in March, 1976 were lawful contracts and were such before school began on August 31, 1976, as said notices could not be ratified or transformed into contracts by accepting services or paying salaries.

The basis of Appellant's claim against the Appellees, Board of Trustees, (79-5777) and Scotty Iverson and Mervin Iverson is the Board's breach of contract, which action, under the circumstances, constitutes slander by implication, although the Board did not actually make any serious charges.

The Board has never denied that Appellant was an excellent teacher who got along well with everyone--students, parents, fellow teachers and school personnel.

Similarly, the statements made by Gladstone and Iverson in a Report submitted to the School Board of which Appellant complains would not be so harmful to her as a teacher, but will be very damaging in her future career as an attorney.

The issue in Hayes v. Board of Trustees and in Hayes v. Gladstone can be stated very simply. The Board of Trustees (Board) offered Appellant a Notice of Reemployment for the next school year on March 23, 1976, which she accepted. On May 20, without cause or statutory authority, the Board, through its Superintendent, notified Appellant that it intended to rescind that contract, contrary to law. Gladstone and Iverson were members of a temporary commission empaneled to hear this one case who submitted an advisory report to the Board recommending that it breach its contract.

As in Valley Bank, Case No. 11631 and Hayes v. Board, the named appellees are not those whose actions are to be reviewed.

Appellant seeks a judgment from this Court that the Nevada Supreme Court may not constitutionally deny her the right to appear in proper person before that Court.

In other actions in Nevada Courts, counsel for the Appellees have attempted to evade that basic issue, which underlies all of the suits in the federal district court and before this Honorable Court. Had the Nevada Supreme Court heard Appellant's appeals, litigation would be confined to the state courts.

The Nevada Supreme Court has dismissed three appeals filed by Appellant. None of these has been on the merits. Appellant has been forced to go into the federal courts and to incur extra expenses. The Nevada Supreme Court has never stated that the appeals to that court lacked merit; if they were frivolous, the appeals could be dismissed on that basis.

Appellees do not deny that the appellant has meritorious causes of action against them. Robert Petroni, counsel for the Board of Trustees, in his "Motion to Dismiss" did not controvert Appellant's statement of the facts. None of the Appellees or other persons mentioned, Robert Petroni, Frank Schreck (CCCTA attorney), Jeffrey Sobel, Appellant's former attorney, Scotty Gladstone and Mervin Iverson, has ever denied doing any of the acts or making the statements of which Appellant complains. Every statement that Appellant has made remains uncontroverted.

The Appellees all rely on technical defenses and NRAP 46(b) to safeguard them from full litigation in the state courts. None of the Appellees has shown how he would be harmed if Appellant were allowed to proceed in proper person.

None of the Appellees has responded to Appellant's contention that the State of Nevada has no rational basis, much less a compelling state interest in continuing to enforce NRAP 46(b).

The Attorney General of Nevada, although advised at all times of the actions in Hayes v. Board of Trustees and Hayes v. Valley

Bank in the Supreme Court of Nevada and of Case No. 79-5777, Hayes v. Board of Trustees, has never intervened or asserted any claim or defense on behalf of the State of Nevada in the Nevada Supreme Court or before this Honorable Court. The Attorney General currently has two deputies assigned to cases which the Appellant is prosecuting in proper person. Neither of them has ever presented any reason for the enforcement of NRAP 46(b), other than that the Supreme Court of Nevada should be allowed to do as it likes.

Appellant mentions these factors by way of preface. Deputy Attorney General Harry Swainston represents the Appellees Gladstone and Iverson in an action still pending in the state trial court (one count was not dismissed) and in the appeal to the Nevada Supreme Court and it is likely that he will be the deputy assigned to represent them before this Court.

Mr. Swainston filed a Motion for Summary Judgment in the trial court on February 15, 1980, notwithstanding that there are material issues in dispute, that his alleged defense of a statute of limitations bar is known by him to be meritless and easily disproved and that this Honorable Court has not ruled on the constitutionality of NRAP 46(b), and that it is not clear whether the Nevada Supreme Court has dismissed the appeal on the merits or only decided that it was premature. Mr Swainston, in an effort to "cover his bets," has taken both of these mutually exclusive positions in papers filed in the state court and the Nevada Supreme Court. He will not have an opportunity to do that in this Court and will have to elect one position.

Not being willing to do this, Mr. Swainston will attempt to divert attention to a discussion of Appellant's financial situation or to the irrelevant complexities of the case against the school district. Anticipating that he will introduce such material as the Majority Report prepared by the Appellees, the

Appellant will outline the contract dispute with the school district in much greater detail than she ordinarily would. The Appellant does not have the burden of proving that her appeals are meritorious or that she has a valid cause of action against Appellees Gladstone and Iverson and she believes that the merits of that case are irrelevant to the issues before this Court for decision.

Hayes v. Gladstone is the only case in which the Appellant is the Plaintiff in state court. In Hayes v. Board of Trustees and Hayes v. Valley Bank, Appellant was originally named as Defendant. Appellant was brought into the judicial process by the actions of other persons and compelled to defend herself in civil actions. Appellant has paid filing fees and cost of service and of preparing and mailing papers. She appealed to the Nevada Supreme Court in proper person because she could not afford the $250 bond and the thousands of dollars for a lawyer.

STATEMENT OF CASE

In thirteen years, there were no complaints about Appellant's performance in any way until the 1975-76 school year when she was transferred to a school where the principal two days later began writing memos alleging that she was "tardy" in the early morning, at 7:50 A.M., which was long before any children were even allowed on the schoolgrounds. These memos were similar to traffic tickets; teachers were required to sign them, but this did not constitute an admission that the memo was true.

The principal admitted at the hearing conducted by Glad stone that she lacked personal knowledge of the alleged "tardies," that her supposed informant, the school secretary, had no accurate record of times or dates and that neither of them could observe the arrival of teachers. There was only one door open at 7:50a.m.

On or about March 1, 1976, the principal and the superintendent unqualifiedly recommended to the School Board that

Appellant be rehired for the 1976-77 year.

Only a few days after making this recommendation, the principal recommended that Apppellant be suspended for two days pursuant to NRS 391.314(4), which provides that a superintendent may discipline a teacher by suspension for two days without pay after a due process hearing has been held. (Emphasis added)

Appellant appeared at this hearing only to enter her objections: the sole witness, not sworn, was the principal; no written evidence was presented; the Assistant Superintendent was the sole judge; there was no appeal from his decision and no record was made. Appellant did not ask CCCTA attorney Frank Schreck for help. He had "represented" teachers at these hearings without objecting to the lack of due process or questioning that the statute might represent an impairment of obligation of contract. Appellant was suspended for two days; she later sued the District for this amount. The case was dismissed without prejudice. Appellant, of course, was not concerned so much with the relatively small amount involved but with the fact that this incident was entered on her personnel record.

Notwithstanding this suspension, the Board, a week later, voted to issue and did issue Appellant an unconditional Notice of Reemployment which she signed and returned. Said Notice was identical to those signed by all other teachers who were reemployed and was the only contract issued for the 1976-77 year. Appellant signed this contract in good faith and relied on it. She did not seek other employment or apply to any law schools, as she would have done if she had known that the District did not intend to honor its contract. The District had several options available: issuing a conditional contract, sending a Notice of Intent Not to Reemploy, beginning dismissal proceedings prior to April 1. If the District thought it had cause for dismissal, it should have proceeded against Appellant then or not rehired her.

One day after Appellant had signed the contract, the principal said she was going to turn in an unsatisfactory rating. The power to fire and hire and enter into and void contracts is vested solely in a school board acting in regular session as a corporate body. Neither a principal, superintendent, individual board member or even a group of them may make a decision about a contract entered into by the board. A school board does not work by committees or by delegation in matters of employment.

On May 18, 1976, the superintendent notified Appellant of

his intent to recommend "dismissal." It was too late then to apply to other districts or to apply to law schools. The board's action had created such a stigma that she could not have obtained another teaching position. It is an extremely serious matter for any school district to rescind a contract; it is very rarely done, almost always only when a teacher has been charged with a felony or crime of moral turpitude. The district's action conveyed that impression.

The appellant was not suspended after receiving the superintendent's letter; she taught the remaining nine days of the school year and the district paid her for her services.

Appellant was a member of three affiliated teachers organizations, National Education Association (NEA), Nevada State Education Association (NSEA) and the Clark County Teachers Association (CCCTA), which promise to provide legal counsel for teachers facing dismissal or disciplinary hearings and to provide subsistence loans for teachers who are pursuing a legal remedy. (This is a prerequisite for the Loan.) Said promises are the major inducement for teachers to join the NEA and its affiliates. Legal services are provided from members' dues.

CCCTA attorney Frank Schreck represented Appellant at a meeting to select a Hearing Commission Chairman and a hearing date was set for July 12, 1976 and all parties notified. Said meeting was not cancelled prior to July 12. Schreck never gave written notice of withdrawal. Pursuant to the Code of Professional Responsibility, DR 2-103(d) and 2-103(D)(5)(d), appellant was Schreck's client, notwithstanding that CCCTA paid him, and he did not have a permissible reason to withdraw.

Schreck abruptly withdrew from the case on June 29, 1976, without Appellant's consent, alleging that he had a never-explained "conflict of interest."

Appellant refused to sign a stipulation proposed by the Department of Education and its legal advisor, Deputy Attorney General Swainston, as it incorrectly stated that the July 12 meeting was to be cancelled because Appellant had a conflict of interest with CCCTA. Appellant didn't have the conflict; Schreck did, and as he had represented her at the selection, Appellant suggested that Schreck sign the stipulation, which was never signed.

Appellant was not able to obtain another attorney.

Schreck's withdrawal was very prejudicial to Appellant. CCCTA NSEA and NEA all failed to fulfill their promise. Appellant could not pay the sizable retainers demanded and she could not guarantee that future fees would be forthcoming from NEA.

Appellant wrote to then Attorney General Robert List asking for a clarification of NRS 391.3196 and NRS 391.120. Deputy Attorney General Swainston's response is appended to the Jurisdictional Statement in 79-5777 at page 5a.

On July 12, 1976, Appellant was the only person to appear at the scheduled time and place for the hearing, although such date was still noted on Mr. Petroni's calendar, and the hearing had not been cancelled.

Appellant received a letter advising her the the Department of Education had no jurisdiction regarding dismissal proceedings. The Department acts only as a coordinator between the parties. Hearing times and places are set by the parties, and costs of transcripts and compensation for the Hearing Chairman are shared equally by the parties -the district and teacher.

A new commission was empaneled with Appellant's objections stated. Appellant participated in the selection process as she believed she had no choice. Neither the Attorney General or Department of Education intervened on her behalf, nor would either office grant her request that the previous hearing be vacated with prejudice to the district for non-appearance. Both claimed lack of authority.

These Hearing Commissions consist of three persons. The district and teacher each choose one member. The only requirement is that such persons have had four years of experience in education. The District chose Appellee Mervin Iverson, one of its administrators. The Chairman is chosen by lot by the teacher and the district from a list of attorneys in private practice. Said attorneys are not administrative law judges.

Mr. Swainston, who is now representing Gladstone and Iverson. in the Nevada courts, alleges that they were acting as state officers, although they were neither appointed, elected, selected or paid by any agency of the state. (Iverson, who acted as a juror, could not be considered as acting in his capacity as a school district employee when he served on the commission.)

Deputy Attorney General Swainston called Appellant several weeks before the hearing. He volunteered the information that

Appellant did not need an attorney. Swainston told her that all she would need to do was to show the hearing chairman her Notice of Reemployment and his letter (J.S. 5a, 79-5777) and the hearing would be over. Appellant believed this. Unfortunately, Mr. Swainston did not tell Gladstone, or if he did, Gladstone disregarded his opinion.

The hearing was held in two half-day sessions on August 27 and 31, 1976. The appellant had not obtained another attorney, and Gladstone would not listen to her explanation. There is nothing in the transcript that supports Gladstone's later statement that Appellant "insisted" on representing herself. Gladstone did not compel Schreck, attorney of record, to appear to represent the Appellant.

At both sessions, Appellant objected on the record that the commission did not have jurisdiction to hear the case, as the school board had acted beyond its power in breaching the contract, and the Superintendent had no statutory authority to ask for empanelment of the commission. Pursuant to NRS 391.3165, Commissions hear and make recommendations in cases of demotion, dismissal or non-reemployment.

Gladstone and Iverson continued anyway in the clear absence of any jurisdiction. Appellant introduced Swainston's letter and other exhibits into evidence.

Gladstone proved to be a very biased hearing officer, as can be demonstrated by a review of the transcript. The district did not sustain its burden of proof, even assuming it was a valid hearing. The sole witness was again the principal who admitted lack of personal knowledge and that her memos did not agree with an "abstract" she prepared, which listed neither times, dates or observers of alleged tardinesses.

During a recess in the hearing on August 27, Robert Petroni, attorney for the School District (Appellee in Case No.

79-5777) delivered a letter from the Superintendent, telling Appellant not to report to work on August 31, beginning of the contract year, and incidentally, second day of the hearing.

Petroni threatened to have Appellant arrested for trespassing if she disregarded the letter. Appellant's letter to the Board president regarding this incident is appended hereto as 10a, infra. Said letter was entered into evidence without objection or denial and is in the Record on Appeal at Volume 3, page 788.

The Record on Appeal is currently lodged with the Clerk of the Eighth Judicial District Court in Las Vegas, Nevada.

After the hearing concluded on August 31, 1976, Gladstone addressed the issue of jurisdiction and requested briefs on Appellant's objections. This action of Gladstone delayed deliberations for several months.

Due to Robert Petroni's threat, Appellant did not attempt to enforce her contract. Neither the school board nor Gladstone reprimanded Petroni, who never denied making this statement.

Appellant wrote the first brief herself in two days and then hired Jeffrey Sobel, who wrote the reply brief and added an issue not raised by Appellant: whether she had been deprived of her right to counsel at the hearing. Appellant had simply stated that the hearing should not be held, and if it were, that Frank Schreck should be present to represent her.

The Appellant paid Sobel at first, and many months later, NEA reimbursed her and promised in writing to pay future fees and costs. Appellant, prior to hiring Sobel, ordered the transcript and paid the entire estimated cost herself. When the transcript was ready, the reporter informed her that the school District had ordered a copy for the Chairman and another for itself and had picked up the copies already.

Following supposedly secret deliberations, Gladstone told

Sobel that the panel had voted 2-1 to recommend "dismissal," whereupon Sobel moved to reopen the hearing, which motion was heard and denied on November 2, 1976. Reopening the hearing was Sobel's idea, not Appellant's, who suggested that Sobel seek a writ of mandamuc in district court to compel the school district to show cause why it should not honor its contract. Sobel replied this would not be "procedurally correct."

At the hearing, Gladstone refused to review the transcript and both he and Petroni denied receiving copies, notwithstanding that the reporter said copies were picked up a week before by the district.

Gladstone composed a Majority Report on November 3, 1976, in which Iverson concurred. Said Report was false, malicious and libelous, containing many insinuations that Appellant had deceived the panel by representing that she was proceeding in proper person while supposedly having the advice of counsel all the time, that she schemed to obtain a second hearing by alleging that she was deprived of counsel at the first,and that she had assistance in preparing her brief, none of which was true.

The major portion of the Report was devoted to allegations that Appellant was "toying with the law," "playing with the law," "exploiting technicalities in the law," and "playing up constitutional issues," all of which were untrue and not relevant or pertinent to the supposed subject of inquiry: alleged tardiness and fitness as an elementary teacher. Gladstone and Iverson knew that Appellant planned to go to law school (the other member referred to this in her Dissenting Opinion) and that such allegations would cause her injury in the future.

On Novembeer 18, 1976, the school board, basing its decision on the Commission's Report, voted to "dismiss" Appellant, retroactive to the end of the previous contract year, which would be June 4, 1976. No mention was made of the contract for the 1976-77 year then in progress. Appellant had not taught at

all as the board had prevented her from fulfilling her contract. The school board's letter is appended hereto as p. 11a, infra. The Board acted on November 18, 1976; Appellant later filed suit against Gladstone and Iverson for libel, interference with a contract and interference with business relationships, based on the fact that defendants and others informed some creditors in advance of their decision and said creditors denied credit. Appellant filed suit on November 20, 1978, a Monday. November 18, 1978 fell on a Saturday. Nevada has a 2 year statute of limitations on libel actions and 4 years on the other claims.

In submitting the record to the district court, Gladstone included the exhibits Appellant introduced on August 27, but omitted those introduced on August 31, 1976, which consisted of 28 exhibits bound in one volume. Sobel insisted that the entire record had been filed. Appellant filed these exhibits herself with the Clerk, at a later date than the rest of the record.

Sobel, without Appellant's knowledge, on his Affidavit that she was indigent, obtained Orders waiving preparation of an Appendix and allowing him to send up the original record.

Unbeknownst to Appellant, Sobel requested that the district court hearing be limited to oral argument of counsel, Sobel and Petroni. Neither attorney included a transcript of the proceedings in the Record on Appeal. As no briefs were filed and no evidence taken, there is a blank record from the trial court.

The district court denied the petition for judicial review and the appeal to the Nevada Supreme Court followed, filed by Sobel. Appellant arranged for the bond and filed it, paid the postage and indexing costs and docket fee after Sobel failed to do so. Appellant later fired Sobel for cause; the Supreme Court of Nevada dismissed her appeal, pursuant to NRAP 46(b) and Appellant appealed to this Court. Case No 79-5777.

CASE NO. 11992, HAYES V. GLADSTONE

The appeal filed by Sobel listed only the school board

as a corporate body as a defendant and asked only for back pay and reinstatement. Sobel gave evasive answers to Appellant's questions as to whether the statute of limitations was tolled as to other defendants and causes of action. Therefore, Appellant filed suit in proper person in state court with Gladstone and Iverson as named defendants on November 20, 1978. Appellant was then a full time law student and had no money to hire an attorney.

The Attorney General of Nevada filed a Notice that his office would represent the defendants and that the time for answering was therefore extended (Gladstone was then already one day in default). Appellant filed an Objection and a motion to enjoin such representation. Without responding to the motion for an injunction, the Attorney General filed a motion to dismiss Appellant responded with a motion to strike and to set aside the appearance of the Attorney General as counsel for defendants.

The district judge denied the motions to set aside and for an injunction from the bench on February 15, 1979, but did not enter a written Order pursuant to FRCP 58. The judge later dismissed three counts of the Complaint on the basis that defendants' actions were privileged. Appellant requested entry of an Order from which she could appeal, and Judge Wendell asked the Attorney General to prepare an Order denying the injunction. See p. 5a, infra. The Order dated May 11, 1979, however, referred to the denial of the motion to set aside the appearance of the Attorney General as counsel.

The appellant had no choice but to appeal from the Order as entered. If she had not appealed, the Nevada Supreme Court would have undoubtedly taken the opposite position that the Order represented a denial of the motion for an injunction. As a precaution, in order to preserve her cause of action, she also appealed the dismissal of the three counts, to avoid the type of decision made in Charmicor, Inc. v. Bradshaw, supra,

and Manzonie v. State, supra.

The appellant's objection was that the defendants were not eligible for representation by the Attorney General, pursuant to NRS 41.03337. Allowing him to represent the defendants would, in effect, predetermine vital issues in the case: whether the defendants Gladstone and Iverson were:

1. acting as public officers or employees
2. acting within the scope of a public duty
3. acting in good faith and not wantonly or maliciously.

These determinations are crucial as recovery would be barred if the defendants acted as public officers, pursuant to NRS 41.035 and NRS 41.032, which limit and preclude an award of damages in actions against state employees or officers.

Nevada Revised Statute 41.035 states:

> 1. No award for damages in actions sounding in tort brought under NRS 41.031 may exceed the sum of $25,000, exclusive of interest to or for the benefit of any claimant. No such award may include any amount as exemplary or punitive damages.

Nevada Revised Statute 41.032 provides:

> No action may be brought under NRS 41.031 or against any officer or employee of the state or any of its agencies or political subdivisions which is:
>
> 1. Based upon the exercise or performance or the failure to exercise a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer or employee of any of these, whether or not the discretion involved is abused. (Emphasis added.)

These statutes purport to grant absolute immunity to all state employees, in contravention to a federal statute. The appellant is challenging the validity of these statutes in that they conflict with 42 U.S.C. 1983, which provides that every person who, under color of law, deprives another of his rights shall be liable to the party injured in an action at law. An action at law, would, of course, allow award of punitive damages. (As one count was not dismissed, the Gladstone

is still pending. Appellant has moved for a declaratory judgment that NRS 41.035 and NRS 41.032 are invalid.

The enforcement of NRAP 46(b) has abridged Appellant's right to litigate adequately in the trial court. She was barred from seeking a writ of mandamus to compel the district judge to enter an appealable Order and is still barred.

The Court denied Appellant's motion for leave to appear in proper person without comment, p. 6a, and stated that the "motion for rehearing is accordingly rendered moot, and is therefore also denied." See p. 8a, infra.

The Appellant filed a precautionary appeal to this Court in the event that the Nevada Supreme Court intended its Order to be a final judgment dismissing some counts of the Complaint.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Nevada Rule of Appellate Procedure 46(b) denies citizens of Nevada full access to the only effective and viable means of resolving legal disputes, defending themselves in civil actions and seeking redress of grievances.

The Nevada Supreme Court is the only appellate court to which adverse judgments and Orders can be appealed.

All appeals are as of right. NRAP 3(a) refers to an "appeal permitted by law" and NRAP 3A(a) states that "Any appealable judgment or order in a civil action or proceeding may be appealed from . . . Any party aggrieved may appeal. . . NRAP 3A(b) lists some appealable determinations. Litigants in proper person are barred from appealing from these Orders as well as from grants or denials of extraordinary writs, declaratory judgments and affidavits of prejudice. Appellant's appeals clearly would have been reviewed and decided on the merits had she been represented by an attorney.

The enforcement of NRAP 46(b) operates as a punishment or penalty for poverty and denies equal protection of the laws to

those who can not afford an attorney. Controversial litigants or those who espouse unpopular causes often can not obtain legal representation, regardless of their ability to pay fees.

Rule 46(b) discriminates between criminal and civil defendants. The criminal defendant, with free counsel avaail-able, may nevertheless represent himself if he wishes. The civil defendant has neither of these rights, unless he is the rare civil litigant seeking a writ of habeas corpus.

Rule 46(b) is arbitrarily and capriciously applied and litigants must guess at which stage it will be enforced. In some instances, District Court clerks refused to accept notices of appeal and sometimes the Supreme Court Clerk would not docket the appeal. The Order in Case No. 11631 implies that the Court would have allowed Appellant to file briefs is she had filed for an extension of time, See p. 3a, whereas in truth, if she had filed such motion, the Court would not entertain it, and it is likely that the Clerk would refuse a brief filed in proper person, as is implied in his letter to Appellant. p. 1a.

The State of Nevada has not demonstrated any compelling state interest to be served or any legitimate justification or even any rational basis for denying access to the courts. Allowing litigants to proceed in proper person would not involve the expenditure of any state funds, nor deprive the state of any revenue, nor place any burden on the judiciary.

Nevada has a very small population; it is unlikely that the Nevada Supreme Court will be inundated with extra appeals if citizens are allowed to appear in proper person. On the contrary, the number of appeals might be reduced. Litigants with attorneys at present have no incentive to settle, as they can easily obtain default judgments simply by appealing any adverse order, knowing that their opponents can not do likewise.

The historical roots of the right to petition have been traced to the Magna and the Declaration of Rights of 1689. The

Supreme Court of Washington considered whether the right to petition contemplates petitioning the judiciary and concluded that the right encompasses, and indeed, makes fundamental the right of access to the courts, as the judiciary is the final arbiter of the Constitution. The court further held that the judiciary is the ultimate enforcer of common law rights and that this process can be commenced only if citizens have the right to invoke the machinery of the courts. Carter v. University of Washington, 536 P. 2d 623 (Wash. 1975).

Courts have required that states justify any restrictions on the right of access to the court. "Public policy mandates free access to the courts for redress of wrongs." Board of Ed. of Farmingdale Union School District v. Framingdale Classroom Teachers Ass'n 380 N.Y. 2d 635, 343 N.E. 278.

In Payne v. Superior Court of Los Angeles County, 132 Cal. Rptr. 405, 553 P. 2d 565, the court held that "To be heard in court to defend one's property is a right of fundamental constitutional dimension, and in order to justify granting such right to one group while denying it to another, the state must show a compelling state interest."

The right of access is not limited to one group, but "includes access to all courts, both state and federal, without regard to the type of petition or relief sought. Hooks v. Wainwright (M.D. Fla. 1972) 353 F. Supp. 163.

Access to the courts is a basic right of every person. Lock v. Jenkins, 464 F. Supp. 541, 552 (1978).

Access to the courts is a right guaranteed as against state action by the due process clause of the Fourteenth Amendment. Coffelt v. State. 440 P. 2d 355.

This Court held in Roberts v. LaVallee, 389 U.S. 40, 19 L. Ed. 2d 41, 88 S.Ct 194, that differences in access based upon financial situation are repugnant to the Constitution.

In Smith v. Bennett, 365 U.S. 708, 709, 6 L. Ed 39, 40,

this court determined that to interpose any financial consideration between an indigent prisoner and his right to sue is to deny him the equal protection of the laws.

In Bounds v. Smith, 97 S. Ct. 1491 (1977), this Court held that there is a fundamental constitutional right of access to the courts.

In the landmark case of Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 113, 91 S.Ct. 780 (1971), this court introduced the concept of the state monopoly over the means of resolving disputes and the question of whether litigants had available extrajudicial means of obtaining redress of grievances or settlement of claims, and ruled that the constitutional guaranties of due process and equal protection require that persons forced to settle their claims through the judicial process must be given a right to be heard and to have full access to the court. The Court distinguished this holding in United States v. Kras 409 U.S. 434, 93 S. Ct. (1973) and in Ortwein v. Schwab, 410 U.S. 656 as it found that extrajudicial means existing for resolving problems, the interest was not fundamental as in Boddie there was not a complete monopolization of means and there was a rational basis for the fees.

None of these factors is applicable to Appellant. There is no forum but the courts for her to vindicate her rights against the Clark County School District and Valley Bank and other defendants. The state has a monopoly over the only available means. This Court has found that access to the courts is a fundamental right which would require a compelling state interest before it can be abridged. There is no rational basis or justification for enforcement of NRAP 46(b).

Boddie, Kras and Ortwein involved the payment of relatively small fees and presumably, the plaintiff had free legal counsel available to prosecute the actions. There is little free counsel available in Nevada. There is a significant

difference between paying court fees as in Boddie and paying thousand of dollars for attorney's fees.

Appellant does not claim that she is indigent in the same sense as the Kras, Boddie and Ortwein plaintiff but she submits that payment of attorney's fees is a far more insurmountable burden for her than the fees which this Honorable Court found oppressive in Boddie, and that the interests which she must defend are as fundamental as those in Boddie.

Appellant does not and did not have sufficient funds to pay an attorney for one appellate case, much less three. She had no source of money available to defend herself in Hayes v. Valley Bank. As for claims that counsel for respondents have advanced in state court, Appellant did not have help available from NEA. NEA's offer to help in the appeal in Hayes v. Board of Trustees in the Nevada Supreme Court was conditioned on Appellant's acceptance of counsel selected by NEA. Appellant's suggestions that NEA set up a fund from which she could pay an attorney have been rejected. Appellant had advised NEA that counsel suggested, Marilyn Romanelli, would be inadvisable. Appellant does not know Ms. Romanelli and does not imply that she is incompetent; the only drawback is that she was formerly a deputy Attorney General and two deputies from that office are presently representing the Justices of the Nevada Supreme Court and the Appellees herein, Gladstone and Iverson.

Appellant received a definitive answer from NEA that it would not provide the requested counsel for the appeals to this Court. By letter dated January 16, 1980, NEA advised that it "would be pointless to try to secure another attorney" and that NEA "will be unable to assist you further." See p. 14a, infra. The counsel referred to are Shreck and Sobel. NEA has sent Appellant a loan for living expenses during the past few months.

Appellant therefore submits this Jurisdictional Statement

in proper person. It is interesting to note, as a reflection on fees charged by Nevada lawyers, that NEA promised to pay $5000 for the Nevada Supreme Court when the only remaining proceeding was oral argument. NEA's promises are generally just that--promises - and Appellant asked that the money be put into a fund first. NEA failed to pay Sobel in a timely fashion and he constantly looked to Appellant for payment.

In Boddie, this Court stated two decisive principles--that due process requires the state to give persons forced to settle their claims in court access to those courts, and that a statute may be constitutional on its face and still be unconstitutional in its application to specific persons.

Appellant has been forced to settle her claims through the judicial process. She was the defendant in Valley Bank v. Hayes and in Clark County School District v. Hayes. The only avenue provided by Nevada law for review of a Board or agency's decision is a petition for judicial review and an appeal to the Nevada Supreme Court.

Pursuant to Nevada Rule of Civil Procedure 13(a), Appellant had to assert her claims against Valley Bank as a compulsory counterclaim. If she had not appeared in the action and had merely paid Valley Bank Master Charge, she would be foreclosed from suing later and it would be a matter of record that she had been sued by a creditor, no matter how wrongful the action was.

Appellant was brought into court by the actions of the appellees herein and in Hayes v. Board of Trustees, and they should not be heard to complain about a multiplicity of actions. Appellant would not have been involved in any court proceeding but for the actions of appellees, and were it not for NRAP 46(b), Appellant would not have filed suits in federal courts or appeals to this Honorable Court.

Gladstone and Iverson refused Appellant's request for a retraction. She could not let their statements go unchallenged; if she did, it would be an admission that said statements were true. Her only recourse was a civil suit. Appellant did not have any alternatives available, as did the plaintiffs in Kras and Ortwein.

Appellant signed a contract with the Clark County School District in March, 1976 for the following year. In May, 1976, the District rescinded its contract. This action created the false and libelous impression that something drastic had happened between March and May to cause the district to void the contract of an excellent teacher with thirteen years experience.

It is difficult for persons not involved in education to fully comprehend what a stigma and badge of infamy such action by a school district places on a public school teacher. It is not comparable to breach of contract in other professions, as teachers are protected in their employment by state law.

Notwithstanding that Appellant holds several teaching and administrative credentials in both California and Nevada, she would be precluded from finding employment in education fields. Appellant's credentials must be renewed every five years; a complete investigation is made and Appellant must explain the disciplinary action and the "dismissal."

Appellant has applied to take the California bar examination this month, February 26-28, and the Nevada bar examination, given only once a year, in July, 1980.

Both state bars require full disclosure about former employment, disciplinary proceedings in any profession, dismissals from employment, civil suits, payment of debts and judgments obtained against the applicant. Records of proceedings in administrative actions are available to the examiners. Gladstone and Iverson's Report, if not challenged, would be accepted as true. The

comments therein, while having nothing to do with Appellant's fitness to be a teacher or the subject of tardiness, have a very direct bearing on Appellant's admission to practice law.

Appellant has some very significant property and liberty interests at stake which are dependent upon her having the right to litigate in the state courts of Nevada. The State has no interest that can balance, much less outweigh, the interests of Appellant.

Appellant satisfies the test articulated by this Court in Kras, supra. She has a fundamental interest that will be gained or lost depending on the availability of her access to the Court. In Kras, the Court found that a fundamental interest was not involved, that he had a theoretical opportunity to seek relief through extrajudicial means and that he could pay the required fee for a discharge in bankruptcy in installments and that the judicial system, as in Ortwein, derived some benefit from the payment of fees. None is applicable in the case at bar. The State of Nevada would not be deprived of any fees.

The appellant has paid filing fees and costs of service and the not inconsiderable cost of preparing and mailing papers and pleadings. She is the only party who has wanted to consolidated cases in the Nevada Supreme Court and in the federal court for hearing on the issue of the constitutionality of NRAP 46(b). Appellant is the only party who has moved to consolidate cases before this Court, and she submits a motion to consolidate herewith. The Appellees and respondents desire a piece-meal adjudication. Neither John Whelton, counsel for Valley Bank, nor the Attorney General, counsel for the Justices of the Nevada Supreme Court and for Appellees Gladstone and Iverson have appeared in Case No. 79-5777 to suggest that these appeals be heard together.

Appellant has the duty of preparing two jurisdictional statements. The Appellees, represented by state-paid attorneys

can take turns filing motions to dismiss at no expense to themselves. The Appellant is the only party who has sought a dismissal without prejudice so that her claims can be tried in only one court, the federal district court. If respondents had agreed to this suggestion, the pending trial court case, Hayes v. Gladstone. the appeals in the Nevada Supreme Court and the appeals to this Court could all be eliminated.

It is the Appellees, not the Appellant, who want a multiplicity of suits. Appellees Gladstone and Iverson have not exercised the option available to them pursuant to 28 U.S.C. 1441(c) of removing the state court case and consolidating it with the action in federal court. Appellant erred in bringing this action in a state court. She has moved for a declaratory judgment that NRS 41.032 and NRS 41.035 are invalid in that they conflict with 28 U.S.C. 1983, as said statutes preclude the award of punitive damages or general damages in an action against state employees of officers. Deputy Attorney General Harry Swainston asserts that actions for deprivation of constitutional rights must be pursued in federal district courts and that U.S.C. 1983 does not provide judicial standards by which a state court could fashion a declaratory judgment.

Appellant, as Plaintiff, can not remove this case to the federal district court for consolidation. The defendants, Appellees herein, can and pursuant to 28 U.S.C. 1446(b), such removal may be made within thirty days whenever it is ascertained that a federal question has been presented. Appellant would also stipulate to a dismissal without prejudice.

The Appellant has been brought into court and forced to defend herself through no fault of her own. The Appellees are in court as a result of their own wrongful actions.

In Boddie, this Court disposed of the argument that a state's interest in the prevention of frivolous litigation and

and allocation of scarce state resources can justify the state in denying access to the courts based on financial situation. This Court pointed out that the connection between a plaintiff's assets and the quality of his litigation is tenuous at best and there are other methods of discouraging frivolous suits. supra at 788.

Nevada's Rule of Appellate Procedure 7, which requires a $250 bond on appeal is certainly sufficient to discourage any so-called "frivolous suits." Additionally, the district court judge may deny an application for leave to proceed in forma pauperis pursuant to NRAP 24(a) if an appeal lacks merit.

Appearing in proper person does not relieve a litigant of the expense of preparing and duplicating briefs.

The Appellant does not ask the State of Nevada to furnish free counsel, paper, stamps, notarial services, law books, transcripts, typewriter, transportation to a law library or to the courts. This Court has ruled most of these benefits must be given to criminal defendants. In addition, the state must pay the expense of guarding a prisoner who is taken to court to argue his own appeal, but as this Court ruled in Price v. Johnson 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356, a court may order a warden to release and transport a prisoner to court to represent himself on appeal, notwithstanding the expense and risk.

All that the Appellant asks is that she be allowed to represent herself, which would not deprive the state of any revenue or involve expenditure of any state funds.

Appellant suggests that the issue at bar closely parallels that in Boddie , that the State of Nevada does not even have the justification that it will be deprived of revenue, and she respectfully asks that this Court reaffirm the precedent set in Boddie and strike down Nevada Rule of Appellate Procedure 46(b) and Supreme Court Rule 44.

NRAP 46(b) CREATES A MONOPOLY AND RESTRAINT OF TRADE

The requirement that appellants in Nevada employ an attorney represents a system of price-fixing, restraint of trade and momopoly by the legal profession similar to that found impermissible by this Court in Goldfarb v. Virginia State Bar, 421 U.S. 773, 93 S. Ct. 2004, 44 L. Ed. 2d 572.

It is not unusual for attorneys to demand $2500 or more to file an appeal. Many civil actions do not lend themselves to a contingency fee arrangement. Hiring an out-of-state lawyer would not alleviate the situation, as such attorneys must be associated with a Nevada attorney. Appellant does not argue that persons other than attorneys should represent litigants, but only that those who wish to do so have a right to represent themselves.

THE RULES AGAINST PROPER PERSON APPEARANCES HAVE THE FORCE AND EFFECT OF LAW AND ARE STATUTES.

The inherent power of the Nevada Supreme Court to control its order of business rules not inconsistent with law has been recognized and expressly conferred by statutory enactment. NRS 2 120 which grants this power is similar to 28 U.S.C. 2072, which provides this Court with its rule-making authority.

The constitutionality of allowing a non-legislative body to in effect enact laws has been dealt with extensively in dissents by Justice Black and Justice Douglas and any discussion would be pointless, as,if NRAP 46(b) is not a statute within the meaning of 28 U.S.C. 1257(2), this Court may, in its discretion, treat the appeal as a petition for a writ of certiorari to the Nevada Supreme Court.

Appellant anticipates that Appellees will raise this point and responds. The Nevada Rules of Appellate Procedure were adapted almost verbatim from the Federal Rules of Appellate Procedure and arguments as to whether these are statutes or rules

are not relevant here. The Nevada Supreme Court has also promulgated its own Rules of Court in addition to the Rules of Appellate Procedure. Supreme Court Rule 44 reinforces the prohibition set forth in NRAP 46(b). Both Rules, set forth on page 3, supra, are listed as Nevada Revised Statutes. This Court has considered Rules of Procedure as statutes when they operate to have the force and effect of law.

THE FEDERAL QUESTION HAS NOT HERETOFORE BEEN DECIDED BY THIS COURT.

The issue of the constitutionality of NRAP 46(b) has been presented previously by at least one other appellants in writs of certiorari, which were denied. Elva Haugen v. Richard Bryan, 420 U.S. 909, 51 L. Ed. 97, rehearing denied 430 U.S. 976; Elva Haugen v. Taylor, 431 U.S. 942. Elva Haugen also took other appeals to this Court from the Nevada Supreme Court, but this writer does not know if said appeals were consolidated with those listed above. Elva Haugen has sued school district employees and board members, and attorneys supplied by CCCTA, Frank Schreck and Richard Bryan, and the attorney for the Clark County School District, Robert Petroni, regarding her dismissal from the school district during a contract year, 1972-73.

Appellant believes that another person, Anthony Cozzetti, who has filed numerous appeals to this Court, may have challenged the constitutionality of NRAP 46(b). Cozzetti sought a writ of mandate to compel a district court (state) to compel discovery in his action against FBI agents and others, from the Nevada Court.

Appellant has an appeal before this Court, with which she asks to have the appeals herein consolidated.

NRAP 46(b) PLACES A BURDEN ON THE FEDERAL COURTS

The Nevada Supreme Court has spared itself any inconvenience at the expense of the federal courts.

The most obvious effect of NRAP 46(b) is that it creates a

multiplicity of actions. Litigants who can not appear in the Nevada Supreme Court must file their actions in the federal district court. The Appellant has been forced to litigate in four courts whereas litigants represented by an attorney, allowed to proceed in the Nevada Supreme Court, can confine their litigation to two state courts. Appellant's suits in the federal district court and before this court would not be necessary but for NRAP 46(b).

Each of the persons who challenge NRAP 46(b) has been compelled to file actions in federal court not only to enjoin enforcement of this rule but also to litigate the substantive claims of the state court suit.

The ambiguity of the Nevada Supreme Court's judgments generates much litigation. The persons mentioned, Cozzetti and Mrs. Haugen, have had suits pending for years for causes of action arising in 1972 and 1973 and both have actions pending in the Ninth Circuit Court of Appeals, which litigation could have been avoided if the Nevada court has taken jurisdiction.

Many actions presently filed in the federal court could be filed in state court. As Nevada has adopted the Federal Rules of Procedure and has a similar system of administration (one judge assigned to case when filed and makes all decisions thereafter) there is no procedural advantage in one court over the other. The only difference is that state court pro per litigants can not appeal Orders from the district court, and sensibly decide to file in federal court whenever possible.

The judgments of the Nevada court leave many questions unanswered, usually relating to finality of the judgment, whether dismissal is without prejudice, what issues can be regarded as fully litigated, who is bound by the judgment, and whether or not there is another valid, not contrived, basis for the dismissal.

All of these issues pertaining to res judicata and

collateral estoppel are litigated in the federal courts, which must interpret what a state court intended in its judgment.

It is interesting to note that all of the persons who have challenged NRAP 46(b) brought suit in state court first when Plaintiffs and only filed in Federal court after the Nevada Supreme Court refused to issue writs or hear appeals.

Only the Mirin decision among those based on NRAP 46(b) has been reported. Appellant learned of the Cozzetti case from a reference made by the Attorney General in a motion filed in federal court. Appellant know Elva Haugen as they once taught in the same school.

All persons mentioned were residents of Las Vegas. Their suits might represent only the tip of the iceberg; there may well be many persons in Nevada litigating in federal courts on this issue. Only the Justices of the Nevada Supreme Court and their counsel know how many suits relating to NRAP 46(b) have been filed.

In Hayes v. Board of Trustees, the Nevada Supreme Court did not state whether dismissal pursuant to NRAP 46(b) and NRAP 42(b) was without prejudice. There is a controversy as to what issues, if any, were litigated; there is no record of the proceedings in the trial court which were limited to oral argument.

The question of whether persons such as Gladstone and Iverson, Appellees herein, are bound or shielded by the judgment is unresolved. The action against the Board in the Nevada Supreme Court was for recovery on a contract.

One count of Hayes v. Gladstone is still pending in the state district court. The Attorney General, notwithstanding the appeal to this Court, filed a motion for a summary judgment on February 15, 1980, to which Appellant had to respond with a cross-motion for summary judgment, pursuant to NRCP 56.

Appellant has not been able to compel entry of an Order

denying an injunction from which she may notice an appeal. In order to obtain a Writ of Mandamus, Appellant, in January, 1980, renewed her motion for leave to appear in proper person before the Nevada Supreme Court. See pp. 5a, 6a, 7a and 8a.

She also moved for a declaratory judgment in the trial court on a collateral issue not involved in the appeal herein: the validity of NRS 41.032 and 41.035. She notified the trial court of the pendency of the appeal to this Court. If appellant did not take action, the trial court suit could be dismissed for lack of prosecution. The validity of NRS 41.032 and 41.035 and the issue of enjoining representation by the Attorney General are important to the determination of the remaining state court count.

Deputy Harry Swainston, on or about February 13, 1980, filed a "Response" in the Nevada Supreme Court, which was primarily an unfounded and fallacious diatribe against pro per and in forma pauperis litigants, the Appellant in particular. Appellant, as Mr. Swainston knew, was barred from replying by procedural rule. Swainston also filed a document in the state trial court.

THE NEVADA SUPREME COURT SHOULD CLARIFY ITS ORDERS PRIOR TO ANNOUNCEMENT OF THIS COURT'S DECISIONS.

The Attorney General takes mutually exclusive positions regarding dismissals by the Nevada Supreme Court. In one paper, he asserts that the Orders, pp. 7a and 8a, dismissing the appeal as to three counts is a dismissal of the counts themselves, a final judgment, the "law of the case," which calls for a "wise policy of repose." No law would be created, however, by a dismissal of an appeal that was premature or not cognizable.

In his motion for summary judgment and another document filed in the trial court, taking the opposite position, he avers that the appeal to the Nevada Supreme Court was premature, that the Supreme Court did not rule on the counts, and that no appeal lies until all counts are disposed of in the trial court.

The Nevada Supreme Court should not be permitted to sit back, await the decision of this Honorable Court, and then interpret its own previous Orders accordingly.

Therefore, Appellant respectfully requests that this Court

direct the Nevada Supreme Court to definitively state whether its Orders, pp. 7a and 8a, in Hayes v. Gladstone, are intended as a dismissal of the counts of the Complaint, or merely a dismissal of the appeal because it was premature, and whether its September 12, 1979 Order in Hayes v. Board of Trustees, (Case No. 79-5777, J.S. pp. 4a and 5a) is a dismissal with or without prejudice, and if it is on the merits, on what basis, and whether the dismissal is of the contract action only against the Board of Trustees only, and that the Nevada Supreme Court clarify its Orders before this Honorable Court announces its decisions.

Whatever this Court's decision may be, such prior clarification by the Nevada Supreme Court would eliminate a great deal of potential litigation.

THE JUDGMENTS OF THE NEVADA SUPREME COURT DO NOT REST ON ANY NON-FEDERAL GROUND

In Hayes v. Valley Bank, Appellant appealed to the Nevada Supreme Court from an Order denying her motions to amend and vacate an Order, entered at Plaintiff Valley Bank's request, which dismissed the action with prejudice as to the defendant, JANICE HAYES. (Emphasis added.) See pp. 12a and 13a. The Plaintiff had obtained this Order without Appellant's knowledge. She was in Los Angeles attending law school summer session at the time. Counsel for Valley Bank did not even send her a copy of its "Consent" document, p. 12a. As in many other instances, in this case and in the others, Appellant had to review court clerks' files to discover stipulations or papers filed by Appellees.

The district judge also denied Appellants's motion for a separate trial of her counterclaim. (Two months after its written acknowledgment of receipt of payment in full on her Master Charge card, Valley Bank reported to a credit bureau that Appellant's account was six months past due.)

The Clerk transmitted the record on February 13, 1979.

By letter dated February 16, 1979, the Nevada Supreme

Court Clerk notified Appellant of receipt of the Record on Appeal.

On March 6, Appellant paid the fee and the appeal was docketed. The Clerk's letter, p. 1a, infra, warned about NRAP 46(b) and implied that Appellant could not proceed, i.e., file briefs, without an attorney. The appeal was perfected at this point.

Appellant filed a motion for leave to proceed in proper person on March 6, 1979, which motion was never granted.

No date was set for oral argument as is customarily done when the appeal is docketed, not after briefs are filed.

On April 25, 1979, the district judge signed the application to proceed in forma pauperis, and by letter dated May 16, 1979, the Clerk advised Appellant of receipt of this Order.

As the appeal had already been docketed on March 6, the forma pauperis issue was moot.

The Appellant reasonably believed that the Court would not let her file briefs, as it had not granted her motions for leave to appear in proper person and for a declaratory judgment regarding NRAP 46(b). The Court had denied leave to appear pro per in other cases, and Appellant believed that the Clerk would not accept briefs unless filed by an attorney.

The Clerk "acts as the Court in carrying out its instructions. A delegation to the clerk of matters involving no discretion clearly suffices to make the clerk's letter a final judgment." Burns v. State of Ohio, 360 U.S. 256, S.Ct. 1168.

Appellant notified the Respondent Valley Bank of her reasons for not filing the briefs, and informed the Court. Valley Bank was not prejudiced in any way and made no objection. Even if scheduled as it should have been on docketing, oral argument would not be heard until February, 1981 or later, at which time Appellant will likely be a member of the Nevada Bar.

In the eight months between March and October, 1979, Valley Bank never attempted to have an oral argument date set. It was apparently confident that the Court would dismiss Appellant's appeal on some pretext, without any action on the bank's part.

On October 4, 1979, without motion from Valley Bank pursuant to NRAP 31(c), the Nevada Supreme Court dismissed the appeal, 2a because Appellant had not filed a brief by June 25, and added that it presumed "further pursuit of this matter has been abandoned." The June 25 date was arbitrary and never communicated. Pursuant to NRAP 31(a), the brief was to be filed 40 days after the date

when the record was filed. See NRAP 12(b). The June 25 date had no relationship to the date of filing or docketing, March 6, 1979.

There was no way for Appellant to guess that the Court would entertain a motion for an extension, assuming that such motion was even necessary, or let her file briefs until it first granted her leave to appear. The Court would not consider a motion filed in proper person.

Appellant was expected to surmise whether the time for filing briefs commenced when the record was transmitted on February 13, or February 16 when it was received, or March 6 when she paid the fee and the appeal was docketed, or April 25 when the district judge signed the forma pauperis application, or May 16, when the Supreme Court Clerk received a copy of said Order, or when the Court granted leave to appear in proper person, which never happened.

"Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24-25, 44 S.Ct. 13, 14.

This Court held in Enterprise Irrigation District v. Canal Co. 243 U.S. 165, that "where the non-federal ground is interwoven so as not to be independent or is not of sufficient breadth to sustain the judgment, our jurisdiction is clear."

This is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent of the decision upon the federal question. supra, at 164.

The exercise of jurisdiction by this Court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny the rights. Rogers v. Alabama, 192 U.S. 226, 230-231, 24 S.Ct. 257. 258.

It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without fair or substantial support. Wolfe v. State of North Carolina 364 U.S. 186, 80 S.Ct. 1482, 1487, and cases cited therein.

This Court concluded in Henry v. Mississipi, 379 U.S. 443, 446-447, 85 S.Ct. at 566-567 that a "litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its

procedural rule serves a legitimate state interest."

"We have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of federal questions is itself a federal question. Henry, supra.

This Court has also reached federal questions which had been avoided by state courts on the grounds that the proper remedy was not used, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, that the argument was too indefinite, Barr v. City of Columbia, 378 U.S. 146, or that the appellant had not given opposing counsel an opportunity to correct the transcript. Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed. 2d 386.

It is not essential that the state court's denial of the federal claim shall have been put in direct terms, it being enough if the necessary effect of the judgment has been to deny the claim. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67.

The Nevada Supreme Court's dismissal of the appeal in Hayes v. Valley Bank because she had not filed briefs, notwithstanding the court had not granted permission to do so, was a clear attempt to evade the federal question presented: the constitutionality of NRAP 46(b). But for NRAP 46(b), Appellant would have filed briefs 40 days after the record was filed.

The State court therefore impliedly decided a federal question and the decision of the federal question was necessary to the determination of the case.

CONCLUSION

For these reasons, the appellant prays that this Honorable Court reaffirm the precedent established in Boddie and strike down an unconstitutional Rule of Procedure which has denied Appellant the right to defend herself in civil actions and to vindicate rights in the state courts of Nevada.

The Appellant respectfully asks the Court to consider the appeals in this Jurisdictional Statement with an appeal already docketed, Case No. 79-5777, Janice Hayes v. Board of Trustees of the Clark County School District, as all appeals concern the same issue.

Respectfully submitted,

Janice Hayes

Janice Hayes, Appellant
In Proper Person

OFFICE OF
CLERK OF THE SUPREME COURT
C. R. DAVENPORT, CLERK
CAPITOL COMPLEX
CARSON CITY, NEVADA 89710

February 16, 1979

Ms. Janice M. Hayes
3391 South El Camino Road
Las Vegas, Nevada 89102

Dear Ms. Hayes:

Re: Hayes v. Valley Bank of Nevada (District Court No. A166497).

The Record on Appeal in the above matter was received today. However, I have not filed the record inasmuch as a filing fee of $25 did not accompany the record.

I note from the record that you moved the lower court to proceed in forma pauperis; however, the record is silent as to an order having been made.

I will retain the record until the fee is remitted or upon order of this Court to proceed without payment of a fee upon motion by you to this Court.

★ I wish to bring to your attention Rule 46 of the Nevada Rules of Appellate Procedure pertaining to practice before this Court.

Sincerely yours,

C. R. Davenport

C. R. Davenport, Clerk

CRD:jr

cc:
Honorable Loretta Bowman, Clerk
John C. Welton, Esq.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,
Appellant,
vs.
VALLEY BANK OF NEVADA,
Respondent.

FILED
OCT 4 1979
C. R. LAVENPORT
CLERK OF SUPREME COURT
BY Judith McCune
DEPUTY CLERK

No. 11631

ORDER DISMISSING APPEAL

Under the provision of N.R.A.P. 31(a), appellant was required to serve and file the opening brief on or before June 25, 1979. She has neither filed the brief nor tendered any explanation for her failure to do so. Under these circumstances, we presume further pursuit of this matter has been abandoned. Accordingly, we

ORDER the appeal dismissed.

Mowbray, C.J.

Thompson, J.

Batjer, J.

cc: Hon. Joseph S. Pavlikowski, District Judge
John C. Whelton, Esq.
Ms. Janice M. Hayes
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,
Appellant,
vs.
VALLEY BANK OF NEVADA,
Respondent.

No. 11631

FILED
DEC 3 1979
CLERK OF SUPREME COURT
BY Joanne C. Richards
DEPUTY CLERK

ORDER

Janice Hayes petitions for a rehearing of our order dismissing her appeal for failure to file briefs pursuant to NRAP 31(a) contending that, since she filed a motion for leave to appear in proper person, see NRAP 46(b), and a motion to waive NRAP 30 and NRAP 32, she is not required to file briefs until we make a decision on those motions.

NRAP 31 provides procedures for gaining extensions of time for filing briefs and for disposition of the appeal in the event that briefs are not timely filed. There is nothing in NRAP 30, NRAP 32, or NRAP 46(b) to suggest that we will automatically waive the requirements of NRAP 31. Accordingly, we perceive no error in our dismissal of this appeal and hereby deny the petition for rehearing.

It is so ORDERED.

Mowbray, C. J.
Mowbray

Thompson, J.
Thompson

Gunderson, J.
Gunderson

Manoukian, J.
Manoukian

Batjer, J.
Batjer

cc: Hon. Joseph S. Pavlikowski, District Judge
John C. Whelton, Esq.
Janice M. Hayes
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,

Appellant,

vs.

VALLEY BANK OF NEVADA, a Nevada banking corporation,

Respondent.

CASE NO. 11631

FILED
DEC 11 1979
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that JANICE HAYES, the above-named Appellant, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Nevada, entered in this action on December 3, 1979, dismissing the appeal in the above-numbered case, pursuant to Rule 46(b) of the Nevada Rules of Appellate Procedure, which prohibits appearances in proper person before the Nevada Supreme Court.

Appellant filed a Motion for Leave to Appear in Proper Person on March 6, 1979, which motion was never granted.

Pursuant to the provisions of NRAP 46(b), Appellant was precluded from filing a brief without leave of the Court.

Notwithstanding that the Court had never granted her permission to do so, the Court, on its own motion, dismissed Appellant's appeal on the basis that she had not filed a brief.

The Court, on the same day, December 3, 1979, also denied Appellant's Motion for Leave to Appear in Proper Person.

/ / /

The question presented is the constitutionality of Rule 46(b) of the Nevada Rules of Appellate Procedure.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

Janice Hayes

JANICE HAYES
Appellant in Proper Person
2353 Portland St., Apt. #1
Los Angeles, CA 90007

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY
LAS VEGAS, NEVADA 89101

MICHAEL J. WENDELL
DISTRICT JUDGE

DEPARTMENT EIGHT

May 1, 1979

Richard Bryan, Attorney General
State of Nevada
Carson City, Nevada 89701

Attn: Harry W. Swainston, Deputy

Dear Mr. Bryan:

Subject: Hayes v. Gladstone & Iverson
Case No. A184743

On February 15, 1979, the Court, from the bench, denied the plaintiff's proper person motion for a permanent injunction to enjoin the Attorney General from representing the defendants in the above-entitled action. At that time the Court did not designate anyone to prepare the appropriate findings and order denying that motion. I have received a written inquiry from the plaintiff, Mrs. Hayes, requesting that there be a formal order entered from which she may notice an appeal. Will you please prepare that order and the appropriate findings and submit them to the Court.

Very truly yours,

MICHAEL J. WENDELL
DISTRICT JUDGE

MJW/s

cc: Mrs. Hayes

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,
Appellant,
vs.
SCOTTY GLADSTONE and MERVIN IVERSON,
Respondents.

No. 11992

FILED
AUG 16 1979
CLERK
BY Judith McCullough
DEPUTY CLERK

ORDER

Appellant's "motion for leave to appear in proper person" is denied.

It is so ORDERED.

Mowbray, C. J.
Thompson, J.
Gunderson, J.
Batjer, J.
Manoukian, J.

cc: Hon. Richard H. Bryan, Attorney General
Harry W. Swainston, Deputy Attorney General
Janice M. Hayes

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,

Appellant,

vs.

SCOTTY GLADSTONE and MERVIN IVERSON,

Respondents.

No. 11992

FILED

AUG 13 1979

CLERK OF SUPREME COURT

BY Judith McCulloch

DEPUTY CLERK

ORDER DISMISSING APPEAL

In her notice of appeal, filed on May 30, 1979, Janice Hayes purports to appeal from (1) an order of the district court filed on May 11, 1979 denying her "motion to set aside the appearance of the attorney general as counsel for the defendants" and (2) an order of the district court filed on March 23, 1979 granting in part respondents' motion to dismiss appellant's complaint.

1. The order of the district court denying the motion to set aside the appearance of the attorney general is not an appealable determination and therefore will not be considered by this court. See NRAP 3A(b).

2. The appeal from the order granting in part the motion to dismiss appellant's complaint is not cognizable. NRAP 3A. See NRCP 54. Accordingly, we

ORDER this appeal dismissed.

Mowbray, C. J.

Thompson, J.

Gunderson, J.

Manoukian, J.

Batjer, J.

cc: Hon. Richard H. Bryan, Attorney General
Hon. Michael J. Wendell, District Judge
Harry W. Swainston, Deputy Attorney General
Janice M. Hayes
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,

Appellant,

vs.

SCOTTY GLADSTONE and MERVIN IVERSON,

Respondents.

No. 11992

FILED

DEC 3 1979

CLERK OF SUPREME COURT

BY Judith McCulloch

DEPUTY CLERK

ORDER DENYING REHEARING

Appellant's motion for rehearing on our order dismissing appeal in the above-entitled matter is denied. Appellant's motion for rehearing on our order denying leave to appear in proper person is accordingly rendered moot, and is therefore also denied.

It is so ORDERED.

Mowbray, C. J.

Thompson, J.

Batjer, J.

Gunderson, J.

Manoukian, J.

cc: Hon. Richard H. Bryan, Attorney General
Hon. Michael J. Wendell, District Judge
Harry W. Swainston, Deputy Attorney General
Janice M. Hayes
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE M. HAYES,

Appellant,

vs.

SCOTTY GLADSTONE and MERVIN IVERSON,

Respondent.

CASE NO. 11992

FILED
DEC 11 1979
CLERK OF SUPREME COURT
DEPUTY CLERK

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that JANICE HAYES, the above-named Appellant, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Nevada, entered in this action on December 3, 1979, dismissing the appeal in the above-entitled case and denying Appellant's Motion for Leave to Appear in Proper Person.

Nevada Rule of Appellate Procedure 46(b) prohibits appearances in proper person before the Nevada Supreme Court.

The question presented is the constitutionality of Rule 46b) of the Nevada Rules of Appellate Procedure.

This appeal is taken as a precaution as to the Order dismissing the appeal. The Appellant had appealed to the Nevada Supreme Court from an Order of the Eighth Judicial District Court denying her Motion for an Injunction to Enjoin the Attorney General from Representing the Defendants. By Order dated August 13, 1979, the Supreme Court dismissed on the basis that this was

not an appealable determination. Appellant petitioned for a rehearing, which was denied on December 3, 1979. The Order stated:

> "Appellant's motion for rehearing on our Order dismissing appeal in the above-entitled matter is denied. . . "

It is not clear whether the Order purports to be a dismissal of the action, or only the dismissal of the appeal from the Order denying an injunction.

This notice is given for the purpose of preserving Appellant's rights in the event that the Nevada Supreme Court takes the former position.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

Janice Hayes

JANICE HAYES
Appellant in Proper Person
2353 Portland St. Apt. #1
Los Angeles, CA 90007

6343 Concho Lane
Las Vegas, Nevada 89102
Telephone: (702) 876-0501

August 28, 1976

Mr. Earl Evans
3825 Emmons St.
North Las Vegas, Nevada 89030

Dear Mr. Evans,

In my letter of August 12, 1976, to members of the Board of School Trustees of the Clark County School District, I asked the Board to give me written notification if they didn't want me to return to work on August 31, 1976, which I would be required to do in compliance with the contract I entered into with the Board on March 23, 1976.

On August 27, yesterday, Robert Petroni handed me a letter from Superintendent Kenny Guinn, which states that Guinn is acting as the Board's representative, and in that capacity, he orders me not to return to work.

Since Mr. Petroni also told me that I will be arrested for trespassing if I attempt to fulfill my part of the contract I have with the School Board by reporting for duty, I will, of course, not go near the school.

I had hoped for a letter from the Board members, and I don't believe that the power to hire and fire and revoke contracts can legally be delegated to the Superintendent, but I certainly don't want to challenge your decision at the risk of being arrested.

I just want to have it on the record that it is the Board's decision and not mine that I do not report on the first day of the teachers' school year, August 31, 1976.

Sincerely,

Janice Hayes

Ms. Janice Hayes
1609 Chapman Dr.
Las Vegas, Nevada 89104

P.S. The dismissal proceedings had not commenced before April 1, pursuant to NRS 391.3196(2), so the second paragraph of Guinn's letter, enclosed, makes no sense.

* * * * * *

RETYPED FROM HANDWRITTEN ORIGINAL, AS COPIES OF ORIGINAL ARE NO LONGER LEGIBLE. This letter was admitted into evidence by appellant without objection or denial on second day of hearing, August 31, 1976.

It is on page 788, Volume III of the Record on Appeal and is one of a groups of exhibits bound together as Exhibit "M", which were not filed in District Court by the Hearing Chairman, Gladstone. Appellant filed the exhibits herself as part of the record.

AN AFFIRMATIVE ACTION EMPLOYER

CLARK COUNTY-SCHOOL DISTRICT

LAS VEGAS, NEVADA 89121

2832 EAST FLAMINGO ROAD - TELEPHONE 736-5011

BOARD OF SCHOOL TRUSTEES

Mr. Earl A. Evans, Jr., President
Mrs. Helen C. Cannon, Vice President
Mr. Glen C. Taylor, Clerk
Dr. Clare W. Woodbury, Member
Mrs. Connie Larsen, Member
Dr. Herman Van Betten, Member
Mr. James A. Gay III, Member

Dr. Kenny C. Guinn, Superintendent

November 19, 1976

Registered
Return Receipt Requested

Ms.
Mrs. Janice M. Hayes
1609 Chapman Drive
Las Vegas, NV 89104

Ms.
Dear Mrs. Hayes:

At our regularly scheduled meeting held on November 18, 1976, the Board of School Trustees met in personnel session regarding the Superintendent of Schools' recommendation to dismiss you from the Clark County School District.

This recommendation is based upon the decision and recommendation by a majority of the hearing commission submitted in accordance with Nevada Revised Statute 391.3193 and 391.3194. The recommendation is that Janice M. Hayes be dismissed as a school teacher in the Clark County School District.

Therefore, it is the decision of this Board to dismiss you as a teacher from the Clark County School District, effective the end of the 1975-76 school year. This decision has been made in accordance with N.R.S. 391.3194.

Sincerely,

Earl A. Evans, Jr., President
Board of School Trustees
Clark County School District

EAE:bf
cc: Dr. Kenny C. Guinn

AN EQUAL OPPORTUNITY EMPLOYER

The Clark County School District does not knowingly discriminate on the basis of sex, age, race, creed or national origin.

FILED

JUN 8 1 05 PM '78

LORETTA BOWMAN
CLERK

BY Marsha Padella

CASE NO. A 166497
DEPARTMENT III
CIVIL DOCKET "E"

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

* * * * *

VALLEY BANK OF NEVADA,
a Nevada banking corporation,

Plaintiff,

vs.

JANICE M. HAYES,

Defendant.

CONSENT TO DISMISSAL OF ACTION WITH PREJUDICE

The undersigned attorney for Plaintiff in the above-entitled action hereby consents to a dismissal of this action, with prejudice, as to the Defendant, JANICE M. HAYES, as full restitution was made to Plaintiff by the said Defendant.

DATED this 7th day of June, 1978.

FREEDMAN & WHELTON

By _____
JOHN C. WHELTON, ESQ.
Attorney for Plaintiff
309 So. 3rd, Suite 316
Las Vegas, Nevada 89101

FILED

JUN 9 3 52 PM '78

LORETTA BOWMAN
CLERK

BY Pamela Meyers

CASE NO. A 166497
DEPARTMENT III
CIVIL DOCKET "E"

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

* * * * *

VALLEY BANK OF NEVADA,
a Nevada banking corporation,

Plaintiff,

vs.

JANICE M. HAYES,

Defendant.

O R D E R

IT IS HEREBY ORDERED that the above matter be dismissed, with prejudice, as to the Defendant JANICE M. HAYES, as the Defendant, JANICE M. HAYES, has made full restitution to the Plaintiff.

DATED and DONE this 8th day of June, 1978.

_____
DISTRICT JUDGE

FREEDMAN & WHELTON

By _____
JOHN C. WHELTON, ESQ.
Attorney for Plaintiff
309 So. 3rd, Suite 316
Las Vegas, Nevada 89101

nea

NATIONAL EDUCATION ASSOCIATION • 1201 16th St., N.W., Washington, D C 20036 • (202) 833-4267

WILLARD H. McGUIRE, President
BERNIE FREITAG, Vice-President
JOHN T. McGARIGAL, Secretary-Treasurer

TERRY HERNDON, Executive Director

TEACHER RIGHTS

January 16, 1980

Ms. Janice Hayes
2353 Portland Street #1
Los Angeles, California 90007

Dear Ms. Hayes:

Since you have not been satisfied with counsel provided by NSEA and NEA in the past, I think it would be pointless to try to secure another attorney.

The NEA will be unable to assist you further.

By now you should have received the December 1979 loan check.

Sincerely,

Martha L. Ware

Martha L. Ware
Manager
NEA Teacher Rights

MLW:kks

cc: Paul Guilarducci
Regional Director - Burlingame Office

APR 1 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6152

JANICE HAYES, Appellant,

v.

VALLEY BANK OF NEVADA, SCOTTY GLADSTONE, MERVIN IVERSON, THE JUSTICES OF THE SUPREME COURT OF NEVADA, AND THE STATE OF NEVADA, Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

MOTION TO DISMISS APPEAL

RICHARD H. BRYAN
Attorney General of the State of Nevada
LARRY D. STRUVE, Chief Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
Attorneys for Appellees

March 28, 1980

ATTORNEY GENERAL'S OFFICE CARSON CITY NEVADA

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

JANICE HAYES, Appellant, v. VALLEY BANK OF NEVADA, SCOTTY GLADSTONE, MERVIN IVERSON, THE JUSTICES OF THE SUPREME COURT OF NEVADA, AND THE STATE OF NEVADA, Appellees.	No. 79-6152 MOTION TO DISMISS APPEAL

COMES NOW the Appellees Scotty Gladstone and Mervin Iverson, by and through their attorneys Richard H. Bryan, Attorney General of the State of Nevada, Larry D. Struve, Chief Deputy Attorney General, and Harry W. Swainston, Deputy Attorney General, and hereby moves this Honorable Court to dismiss the appeal of the above captioned case pursuant to Supreme Court Rule 16, upon the following grounds:

1. The appeal from the Supreme Court of the State of Nevada does not present a substantial federal question in that as respects the case of Janice Hayes v. Scotty Gladstone and Mervin Iverson, No. 11992, before the Supreme Court of the State of Nevada, no order of the Court has been entered which would deny Appellant the opportunity to appear before the Supreme Court of the State of Nevada in proper person. Thus, the federal question sought to be reviewed was not raised or expressly passed on and therefore Appellant's appeal should be summarily rejected.

This Motion To Dismiss Appeal is based upon Supreme Court Rule 16(1)(b), the Points and Authorities attached hereto,

ATTORNEY GENERAL'S OFFICE CARSON CITY NEVADA

and upon the papers and pleadings on file herein.

Respectfully submitted this 28th day of March, 1980.

RICHARD H. BRYAN
Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By
Larry D. Struve
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POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS APPEAL

I

THE APPEAL FROM THE SUPREME COURT OF THE STATE OF NEVADA DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION WHICH WAS RAISED OR EXPRESSLY PASSED ON BY THE SUPREME COURT OF THE STATE OF NEVADA.

As noted by Appellant at page 3, lines 3-6, of the Jurisdictional Statement she has "taken a precautionary appeal to this Court in Hayes v. Gladstone." This Court should decline jurisdiction to review appellant's precautionary appeal because the Nevada Supreme Court has entered no order which raises the federal question presented for review. On August 16, 1979, the Nevada Supreme Court dismissed the appeal brought by appellant because the order of State District Court was not an appealable order. The Nevada Supreme Court, therefore, neither addressed nor decided the question of whether appellant was precluded from appearing before the Nevada Supreme Court pursuant to Nevada Rule of Appellate Procedure, Rule 46(b). The Nevada Supreme Court entered the following Order Denying Rehearing on December 3, 1979:

"Appellant's motion for rehearing on

ATTORNEY GENERAL'S OFFICE CARSON CITY NEVADA

our order dismissing appeal in the above-entitled matter is denied. Appellant's motion for rehearing on our order denying leave to appear in proper person is accordingly rendered moot, and is therefore also denied.

It is so ORDERED."

CONCLUSION

It is respectfully requested that this appeal be dismissed for the reasons presented.

Dated this 28th day of March, 1980.

Respectfully submitted,

RICHARD H. BRYAN
Attorney General of the State of Nevada
HARRY W. SWAINSTON
Deputy Attorney General

By Larry D. Struve
Larry D. Struve
Chief Deputy Attorney General
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Capitol Complex
Carson City, Nevada 89710

PROOF OF SERVICE

I, Larry D. Struve, an attorney for the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of March, 1980, I served copies of the foregoing Motion To Dismiss Appeal and Points and Authorities In Support Of Motion To Dismiss Appeal on the following person, by mailing copies in duly addressed envelopes, with first class postage thereon, prepaid, as follows:

Ms. Janice Hayes
6343 Concho Lane
Las Vegas, Nevada 89102

2353 Portland Street, Apartment 1
Los Angeles, California 90007

I further state that all parties required to be served have been served.

Larry D. Struve
Chief Deputy Attorney General
Heroes Memorial Building
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Carson City, Nevada 89710

Supreme Court, U.S.
FILED
APR 16 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6152

JANICE HAYES, Appellant

v.

VALLEY BANK OF NEVADA,
SCOTTY GLADSTONE, MERVIN IVERSON,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES SCOTTY GLADSTONE AND MERVIN IVERSON'S MOTION TO DISMISS APPEAL

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Appellant in Proper Person

April 5, 1980

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JANICE HAYES, Appellant

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VALLEY BANK OF NEVADA, SCOTTY GLADSTONE, MERVIN IVERSON,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEVADA

BRIEF OF APPELLANT IN OPPOSITION

TO MOTION TO DISMISS APPEAL

COMES NOW the Appellant in Proper person, JANICE HAYES, and submits this Brief in Opposition to the Motion to Dismiss Appeal filed by Appellees Scotty Gladstone and Mervin Iverson.

The appellant combined two cases, Hayes v. Gladstone and Iverson and Hayes v. Valley Bank of Nevada in one Jurisdictional Statement and the appeals were docketed as the within Case No. 79-6152 on February 28, 1980.

Appellant respectfully requests that this Court consider Case No. 79-6152 with another appeal now before the Court on a Petition for Rehearing, Case No. 79-5777, Janice Hayes v. Board of Trustees of the Clark County School District, which the Court dismissed for want of jurisdiction on February 19, 1980.

All three appeals are from the Supreme Court of Nevada and concern the same issue: the constitutionality of Nevada Rule of Appellate Procedure 46(b), which prohibits appearances before the Nevada Supreme Court in proper person, and whether that Court may dismiss, evade and refuse to consider appeals of right for the sole reason that Appellant is not represented by an attorney.

Appellant has not been able to consolidate these appeals as there is no provision in the Supreme Court Rules for a motion to join an appeal filed later, the case herein, docketed February 28, 1980, with an appeal based on the same question already before the Court, Case No. 79-5777, docketed December 12, 1979.

For the same reason, the real party in interest, the Nevada Supreme Court, is not an Appellee. The caption of Appellee's Motion to Dismiss Appeal incorrectly lists the Justices of the Nevada Supreme Court and the State of Nevada as Appellees. The appellant included them as such in her Jurisdictional Statement, but was advised by the Clerk of this Court that only those who were parties in the Court below may be Appellees in this Court.

The Attorney General, therefore, does not represent the people of the State of Nevada or the Justices of the Nevada Supreme Court in the appeal herein.

The Nevada Supreme Court, not being represented by the Attorney General, is not bound by his statements or interpretations of its Orders, and it will remain free to await the decision of this Honorable Court and then interpret its own Orders accordingly.

Appellant, therefore, respectfully repeats her request that this Court direct the Nevada Supreme Court to definitively state whether its Orders in Case No. 11992, Hayes v. Gladstone, are intended as a dismissal of counts of the Complaints or merely a dismissal of the appeal as not cognizable, and if the former, whether the dismissal is with or without prejudice and for what reason, and that such clarification be made before this Court announces its decision. The Orders referred to are attached to the Jurisdictional Statement in the case herein at pages 7a and 8a.

Appellee's motion merely repeats Appellant's statement that the appeal of Hayes v. Gladstone is precautionary, a fact not in dispute, without addressing any of the points presented in the Jurisdictional Statement.

The combined effort of three attorneys produced only one conclusory contention which is unsupported by the facts.

THE APPEAL FROM THE SUPREME COURT OF NEVADA PRESENTS A SUBSTANTIAL FEDERAL QUESTION WHICH WAS TIMELY RAISED.

The Appellee's own motion disproves the statements therein. On page 1, they assert that "no order of the Court has been entered which would deny Appellant the opportunity to appear before the Supreme Court of the State of Nevada in proper person," and on page 2 that "the Nevada Supreme Court has entered no Order which raises the federal question presented for review, and the Court, therefore, neither addressed nor decided the question of whether Appellant was precluded from appearing before the Nevada Supreme Court pursuant to Nevada Rule of Appellate Procedure, Rule 46(b)."

The issue is not whether the Nevada Supreme Court raised the issue, but whether Appellant did, and the answer is emphatically affirmative.

Appellees quote from the Order entered December 3, 1979, which clearly proves that Appellant raised the federal question, not only once, but several times.

The Order, on page 3 of Appellee's motion, states:

" . . . Appellant's motion for rehearing on our order denying leave to appear in proper person is accordingly rendered moot, and is therefore also denied. . ."

Appellant had also raised the federal question in a motion for a declaratory judgment in Hayes v. Gladstone and Hayes v. Valley Bank as well, which motions were never ruled on.

Upon appeal to this Court, Appellant moved for a stay of remittitur and after the stay was granted, she timely moved for

extensions. On March 11, 1980, after receiving notice of the docketing of this appeal, the Nevada Supreme Court vacated the stays in Hayes v. Gladstone and Hayes v. Valley Bank.

The Order refers to the declaratory judgment, and states that "we decline to consider any further matters in this case." See p. 1a, infra.

The Appellant thus raised the federal question four times in Hayes v. Gladstone in motions and petitions for rehearing, and in addition, she presented the issues many times in Hayes v. Board of Trustees, Case No. 79-5777 in this court, and in Hayes v. Valley Bank, which is included with Hayes v. Gladstone in the appeal herein.

All of these cases were pending at the same time and the motions were made over an eight month period.

If the issue was not decided or expressly passed on, this is not due to any lack of diligence by Appellant, but rather to the efforts of the Nevada Supreme Court to evade consideration of the federal question.

Taken together, the Orders issued in these cases clearly demonstrate a pattern of evasion both as to the constitutionality of NRAP 46(b) and whether or not dismissals are with prejudice. The Court need only add two words, either "with prejudice" or "without prejudice" to its Orders, but has consistently failed to do so. See Case No. 79-5777, J.S. pp. 1a, 2a, 3a, 4a, 5a, 6a and No. 79-6152, pp. 2a, 3a, 6a, 7a, J.S., and page 1a of this brief.

A review of orders issued in cases filed by other litigants in proper person demonstrates the same pattern of refusal to address or determine the question of the constitutional of NRAP 46(b).

Appellant has met the burden of showing that she timely raised the federal question and that the federal question was

necessary to the decisions in these cases and that there is no adequate, non-federal ground for any of the decisions.

It is not essential that the state court's denial of the federal claim shall have been put in direct terms. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63. The state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point. supra. Chambers v. Mississippi, 410 U.S. 284, 290; Street v. New York, 394 U.S. 576, 582.

The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts. Street, supra, page 583.

It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court, Wolfe v. State of North Carolina, 364 U.S. 186, 80 S.Ct. 1482, 1487.

The failure of the state court to pass upon the federal claim is not conclusive. Wood v. Cheseborough, 228 U.S. 672, 676-680; B & Q R. Co. v. Illinois ex rel Com'rs, 200 U.S. 561. 580-581.

By refusing to rule on the issue, the Nevada Supreme Court has impliedly upheld the constitutionality of NRAP46(b).

As his office does not represent the Justices of the Nevada Supreme Court and they are not parties herein, the Attorney General's guess as to what the Court meant in its decision is no better than Appellant's or that of the proverbial man in the street, for that matter, and should be accorded no more weight.

THE ISSUE IS SUBSTANTIAL AND IMPORTANT

The Attorney General says that the federal question is not substantial. Nevertheless, he has added another deputy

(Struve) to his arsenal. Counting the Attorney General, his three deputies and Robert Petroni, counsel for the Clark County School District, there are five State employed attorneys assigned to cases which the Appellant is pursuing in proper person. Valley Bank has private counsel, John Whelton, in addition.

The issue involved, the constitutionality of NRAP 46(b), would seem to be of great interest only to Appellant and a few other persons similarly situated who seek to appear in proper person before the Nevada Supreme Court, but apparently she underestimates its significance.

The importance of this issue can be gauged by the attention which the Attorney General devotes to it. There are more deputies assigned to these cases than to others which vitally affect the majority of the citizens of Nevada such as Case No. R-78-0077 BRT, U.S. District Court in Reno, State of Nevada v. United States of America, concerning the disposition of 49 million acres of public land held by the Department of the Interior, or Case No. CV-LV-79-174 RDF, Alladin Hotel v. Nevada Gaming Commission, regarding the right of a federal judge to enjoin enforcement of a state gaming commission's orders, or Nevada v. Hall, 99 S.Ct. 1182, or Nevada v. California before this Court.

The State of Nevada is litigating the constitutionality of NRAP 46(b) in five courts--state and federal District Court, Supreme Court of Nevada, Court of Appeals of the Ninth Circuit and the United States Supreme Court--in actions brought by Appellant and others, and will continue to do so until there is a final resolution.

THE RULES PROHIBITING PROPER PERSON APPEARANCES HAVE THE FORCE AND EFFECT OF LAW AND ARE STATUTES.

The letter which Appellant received from the Clerk of this Court stated that the appeal in Hayes v. Board of Trustees, Case No. 79-5777, was dismissed on February 19, 1980 for want of a substantial federal question. The official report, 62 L. Ed 2d 739, says the dismissal was for want of jurisdiction. Appellant

assumes the official report is correct and now addresses the issue of jurisdiction in greater detail. She was under the impression that the dismissal was for want of a substantial federal question when she wrote the Petition for Rehearing in Case No. 79-5777 and responded accordingly.

Pursuant to the appellate authority vested in the Court by Section 4 of Article 6 of the Constitution of the State of Nevada, and the rule-making authority vested in the Court by Nevada Revised Statute 2.120, the Supreme Court of Nevada adopted rules governing appellate practice before the Court. NRS 2.120 is similar to 28 U.S.C. 2072, which grants rule-making authority to the U.S. Supreme Court.

The Nevada Supreme Court appointed a committee composed of members of the State Bar, which recommended that the Federal Rules of Appellate Procedure be adopted as they were particularly harmnonious with the Federal Rules of Civil Procedure which had been adopted earlier. The Court entered an Order adopting such Rules, which were taken almost verbatim from the federal rules.

Appellant has invoked the jurisdiction of this court pursuant to 28 U.S.C. 1257(2) which provides that final judgments of a state court may be reviewed by appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant contends that NRAP 46(b) meets the requirement of being a statute, as it has the force and effect of law.

NRAP 46(b) represents the only significant difference between the federal and Nevada rules of appellate procedure, and there is no explanation as to why this provision was added.

NRAP 46(b) is listed as a statute, Nevada Revised Statutes Volume 2, page 1004, and the historical note specifically states

that "Rules of court adopted for the dispatch of business and the impartial administration of justice have the effect of positive law," Nevada Revised Statutes, Volume 1, page 230.

For purposes of appeal, the term "statute" refers to every enactment, legislative in character, to which the state gives the force of law. Williams v. Bruffy, 96 U.S. 176, 182-183, 24 L. Ed. 716. A "state statute" includes a municipal ordinance, the order of a state administrative agency if it is legislative in nature, Lake Erie & W.R. Co. v. State Public Utilities Comm., 39 S. Ct. 345, 346, 249 U.S. 422, and any other enactment to which the state gives the force of law. Wright, Law of Federal Courts, page 532-533.

These enactments which are considered statutes include a provision of a state constitution, Railway Express Agency v. Virginia, 51 S. Ct. 201, 282 U.S. 440, a municipal ordinance, Erznoznik v. City of Jacksonville, 95 S. Ct. 2268, 422 U.S. 205, a traffic regulation promulgated by a city police commission, Railway Express Agency v. New York, 69 S.Ct. 463, an order of the regents of a state university, Hamilton v. Regents of the University of California, 293 U.S. 245, 55 S.Ct. 197, and a court order establishing an integrated bar, Lathrop v. Donohue, 367 U.S. 820, 824-827, 81 S.Ct. 1826, 1828-1829.

This Court discussed the issue in Chrysler Corp. v. Brown, 99 S.Ct. 1705 and provided a definition:

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristices and be the product of certain procedural requisites. . . in Morton v. Ruiz, we noted a characteristic inherent in the concept of a 'substantive rule.' We described a substantive--or a 'legislative-type rule,' as one affecting individual rights and obligations.' This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'"

The Court noted another important requirement--rules which have the force and effect of law must be products of a grant of

legislative authority. NRAP 46(b) meets all of these standards: it affects individual rights and the Nevada Rules of Appellate Procedure were promulgated pursuant to legislative and constitutional grant of authority.

Nevada Rule of Appellate Procedure 46(b) is, therefore, a statute within the meaning of 28 U.S.C. 1257(2).

NEVADA RULE OF APPELLATE PROCEDURE 46(b) CREATES A MONOPOLY, RESTRAINT OF TRADE AND PRICE-FIXING SYSTEM

Alternatively, if this Court decides that NRAP 46(b) is not a statute, then the concept of exemption under the Sherman Act, 15 U.S.C.A. 1, as state action would not be applicable.

This Court held in Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, that the sale of legal services is within the Act, and that "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."

The State Bar of Nevada and the Nevada Supreme Court have promulgated NRAP 46(b), which apparently operates only to the benefit of members of the bar and the Court. As long as civil litigants are denied the right to represent themselves, even granted that most appellants will not exercise that right, members of the bar can charge whatever the traffic will bear for appellate representation.

There is also a restraint of ideas and suppression of unpopular (with attorneys) causes and some citizens can not obtain an attorney at any price. Litigants facing wealthy or politically influential opponents also have difficulty in hiring an attorney.

If NRAP 46(b) was designed to protect the people of Nevada against "frivolous appeals," it is under-inclusive, as this Rule does nothing to protect against suits brought by litigants represented by attorneys. All appeals are as of right, and any and every case can be appealed, without regard to merit.

There is no record that any attorney was ever disciplined for taking a meritless appeal.

ALLOWING DISMISSAL OF HER APPEAL PURSUANT TO NRAP 46(b) WOULD PENALIZE APPELLANT FOR FILING IN STATE COURT

Appellant brought the action against Gladstone and Iverson in state court on November 20, 1978. Other persons were listed but not named as defendants. Three of the four counts--for libel, interference with a contract and deprivation of civil rights--were dismissed on the basis of privilege and immunity. The subsequent appeal to the Nevada Supreme Court was dismissed, but it is not clear if this is without or with prejudice.

When it became apparent that Appellant could not proceed in state courts due to the implementation of NRAP 46(b), she filed a "back-up" suit in the federal district court in Las Vegas, listing Gladstone, Iverson and others as defendants, on July 9, 1979. No defendants have been served as yet.

If the Nevada Supreme Court's dismissal in this case and in Hayes v. Board of Trustees is considered as being on the merits, it will seriously impair the litigation in the federal court.

If Appellant had filed originally in federal court, she would not have encountered any problems. To uphold the validity of dismissals pursuant to NRAP 46(b) would, in effect, penalize her for pursuing state court remedies first.

There are at least three federal questions which would invoke and support federal jurisdiction:

1. There is a cause of action pursuant to 42 U.S.C. 1983. Gladstone and Iverson were members of a temporary Hearing Commission empaneled under the auspices of the Nevada Department of Education. They were acting under color of state law when theylibelled Appellant in an advisory report submitted to the Board of Trustees of the Clark County School District.

2. The statutory scheme creating such Hearing Commissions

is defective in that it does not provide a due process hearing. The first requirement for due process is a fair tribunal. Members of these commissions are not sworn and there is no challenge for bias. Mervin Iverson was an employee of the Clark County School District and was paid his regular salary by the District during the time he served on the commission, pursuant to NRS 391.3192(6). Iverson was "appointed" by the School District to serve on the commission.

In order to have a hearing, teachers are required to pay one-half of the Hearing Chairman's salary and one-half of the cost of a transcript, if the Chairman requests one be made, pursuant to NRS 391.3192(4), (5).

3. Appellant is seeking a declaratory judgment in the state and federal court actions that NRS. 41.035 and NRS 41.032, which limit and preclude awards of punitive damages in actions brought against state employees or officers, are invalid in that they conflict with the provision of 42 U.S.C. 1983.

The state district court has denied Appellant's motion for said declaratory judgment.

NRAP 46(b) IS VAGUE AND IS ARBITRARILY AND CAPRICIOUSLY APPLIED

Appellant's expected admission to the Nevada Bar might not render the issue of the constitutionality of NRAP 46(b) moot or inapplicable, as the Rule does not say whether an attorney may represent herself.

NRAP 46(b) is arbitrarily and capriciously applied and litigants never know at what point the Nevada Supreme Court will decide to enforce it. In some cases filed by other litigants, clerks of the state district courts have refused to accept a Notice of Appeal filed in proper person or to transmit the record. In some instances, the record is transmitted but the Clerk of the Nevada Supreme Court refuses to docket the appeal. In Hayes v. Board of Trustees, the Court denied leave to appear in proper person at oral argument or to file new briefs, although Appellant notified the court that she had discharged her attorney, Jeffrey

Sobel, seven weeks prior to the scheduled oral argument date. Appellant was allowed to docket the appeals in Hayes v. Gladstone and Hayes v. Valley Bank, but was then barred from proceeding further.

The Justices merely performed an administrative function and did not adjudicate the issue of whether or not Appellant should be allowed to appear in proper person. Their Orders, therefore, are not judicial decisions which would not be subject to review.

CONCLUSION

For the reasons set forth above and those contained in the Jurisdictional Statement and the Jurisdictional Statement, Brief in Opposition to Motion to Dismiss Appeal and Petition for Rehearing filed in Case No. 79-5777, Appellant respectfully requests that this Honorable Court deny Appellees' Motion to Dismiss Appeal.

Appellant prays that this Court reaffirm the precedent established in Boddie v. Connecticut, and declare that the provisions of Nevada Rule of Appellate Procedure are unconstitutional as applied to Appellant and that Orders of the Nevada Supreme Court dismissing appeals pursuant to said Rule are invalid if intended to operate as dismissals with prejudice.

Respectfully submitted,

JANICE HAYES
6343 Concho Lane
Las Vegas, Nevada 89102
Telephone: (702) 876-0501
Appellant in Proper Person

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANICE HAYES,

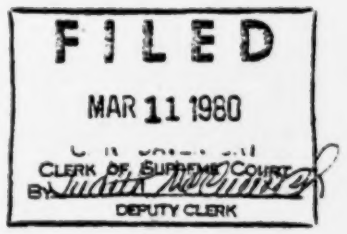
Appellant,

vs.

SCOTTY GLADSTONE and MERVIN IVERSON,

Respondents.

No. 11992



ORDER

After Janice Hayes filed a notice of her appeal to the United States Supreme Court, we granted her motion for a stay of remittitur for 30 days pursuant to NRAP 41(b). Hayes now moves to extend that time. Since she shows no reason why we should so do, and an adequate remedy is provided in 28 U.S.C. § 2101(f), we decline to stay remittitur further.

The order of December 26, 1979, staying the remittitur for a 30-day period should be, and hereby is, vacated. The remittitur shall issue forthwith.

Hayes also asks for a declaratory judgment as to the constitutionality of NRAP 46(b). Since we have already denied a rehearing on our order dismissing appeal, we decline to consider any further matters in this case.

It is so ORDERED.

Mowbray, C. J.

Thompson, J.

Gunderson, J.

Manoukian, J.

Batjer, J.

cc: Hon. Michael J. Wendell, District Judge
Hon. Richard H. Bryan, Attorney General
Harry W. Swainston, Deputy Attorney General
Janice Hayes
Loretta Bowman, Clerk